

HABEAS CORPUS

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The Civil War

Habeas Corpus

Excerpts from newspapers and other sources

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THE WRIT OF HABEAS CORPUS.

Letter from Hon. Silas M. Stillwell to Hon. Edward Bates, Attorney-General of the United States.

SIR: I have read with attention the various newspaper articles that have appeared upon the subject of the rights and duties of the President, with respect to the writ of *habeas corpus*, including the opinion of Chief-Justice TANKY, and the speech of Mr. BRECKINRIDGE; and as the question has become more important by the increase of "rebellion," and the vigorous action of the Executive departments, I will take the liberty of laying before you the facts and conclusions that have induced me to form the opinion I shall express in this letter.

The enumerated *positive* powers of Congress I find in the 8th section of the 1st article of the Constitution of the United States, and in the 9th section of that article I find an enumeration of powers *denied* to Congress. In the second subdivision of said 9th section, the writ of *habeas corpus* is mentioned in these words: "The privilege of *habeas corpus* shall not be suspended unless when, in cases of *rebellion or invasion*, the public safety may require it." This writ is not mentioned in any other part of the Constitution. I find no power conferred upon Congress, in the 8th section, to suspend this writ, yet some persons say that it is contained in the 11th subdivision, which gives to Congress the power "to declare war, grant letters-of-marque and reprisal, and make rules concerning captures on land and sea." But the power herein granted to "declare war" does not appear to be sufficiently comprehensive, as "rebellion" generally begins before a declaration of war, and is generally continued without such declaration. The 11th subdivision evidently refers to a war with another independent Power, and it is also apparent that a war with another nation may exist without an invasion, as was the case in our war with Mexico. The language in this section is very *emphatic*. "The privilege of the writ of *habeas corpus* shall not be suspended unless in cases of *rebellion or invasion*." It is very plain that during our war with Mexico neither rebellion nor invasion occurred, and hence the privilege of the writ *could not have been* suspended by the declaration of war, at that time.

The power to suspend this writ does not appear among the enumerated powers of Congress, as I read them, and this opinion is strengthened by the 9th and 10th amendments to the Constitution, which are as follows: "The enumeration in the Constitution of certain rights shall not be construed to *deny or disparage* others retained by the people." "The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." These amendments appear to deny to Congress all inferred powers that are not *plainly* necessary to carry into effect some *conceded* power. The Constitution has been framed with so much care that it speaks of powers *conferred*, and powers *denied*, so as to prohibit, as far as possible, the exercise of inferred or constructive powers. It is therefore eminently proper to examine its construction with great caution, and if possible make its meaning *harmonize* with the comprehensive wisdom of its great authors.

The next place where this power is looked for in the Constitution is under the second article, which treats of powers conferred upon the President of the United States.

The President is made the "Commander-in-Chief of the Army and Navy, also of the militia of the United States, when in actual service, and he has power to grant reprieves and pardons for offences against the United States, except in cases of impeachment." These powers are very comprehensive, but I see nothing in them, or in any part of the Constitution, which confers upon the President, by any fair construction, the power to abolish or suspend this writ. A careful examination of the nature and value of this writ, as laid down by our law writers, since the grant of it by *compulsion at Runnemede*, has satisfied me that our

fathers valued the privilege of this writ too highly to place it within the control of *any or all* the Departments of our Government. The great framers of the Constitution had suffered too much from the *abuse* of this power to place it under the control of *any authority emanating from them*. Without the privilege of the writ of *habeas corpus* there is *no power* that can extricate a person from the prison to which an executive mandate may consign him, and I think, therefore, that few persons will assert that this most *cherished right* has been *taken from* the people and conferred by a *doubtful* clause in a *negative* section of the Constitution upon *any* Department of the Government.

I think you will agree with me that as the necessity for suspending the privilege of this great writ was *plainly* anticipated, so has the occurrence been provided for, in a way perfectly consistent with the wisdom of our great forefathers. The *privilege* of the writ is *suspended by an act* of rebellion. No power but the people can *destroy* this writ, and no act but "rebellion or invasion" can *suspend* it. No act of Congress or act of the President, but *acts* of rebels suspend it. In other words, an act of rebellion deprives the rebels of the privilege of the writ, and the writ is suspended *pro tanto*.

The framers of the Constitution intended that this instrument should embody and contain all the properties and characteristics of a monarch that can be embraced in a written charter. This instrument represents the existence, the vitality of our political life, and therefore it contains within itself a self-sustaining force, and a critical examination will prove that the power to perform every act *necessary* to sustain our rights and liberties, can be found in this great charter. This provision about the suspension of the privileges of the writ, is based upon the *real truth* of self-defence. If any human being is assailed by an assassin, he has the inherent natural right to kill the assailant to protect his own life, notwithstanding the general law that punishes murder with death. So the framers of the Constitution have considered the case of "Rebellion" as an attempt to take the life of the Constitution, and have authorized the Chief Executive to strike down the assassin.

Whenever "Rebellion" *actually* exists, the privilege of the writ is *ipso facto* suspended. It requires no legislative enactment, or Presidential proclamation; and I suppose Congress had grave doubts about *their* power upon this subject, or they would not have adjourned without acting, as there existed when they were in session, as now, the greatest and most dangerous rebellion that has ever been known under this Government.

The writ of *habeas corpus*, as you well know, is a process from the courts to compel the Executive power to show *legal* cause for the arrest and detention of any imprisoned person. Thus the judicial power is made *superior* to Executive authority, over the liberty of the people, inasmuch as the courts may discharge any person from imprisonment. But when the privilege of this writ is suspended, the Executive may arrest and hold persons without being questioned by the courts. The manner in which this privilege is suspended is peculiarly worthy of commendation. Unless "Rebellion" suspends the privilege of this writ it is not possible for the President to comply *Constitutionally and instantly* with the obligations of his oath to *preserve, protect and defend* the Constitution of the United States. It would be a solecism in language to say that the President is bound to use unconstitutional power to *preserve* the Constitution—to violate the Constitution to enable him to protect it against violation by others. Under and by virtue of this oath the President is made the preserver, protector and defender of the Constitution, in whole and in part, at all times, and under all circumstances; and under the interpretation herein given, it is his plain and imperative duty, when "rebellion" exists, to arrest and imprison any person that he may think endangers the public safety.

It is the duty of every citizen to obey and sustain the laws and the Constitution, but the President *alone* is compelled to *swear* that he will *preserve, protect and defend* the Constitution. Thus he is made by the instrument its chosen head and champion, and it wisely provides him with absolute power over life and liberty, to enable him the more effectively to preserve, protect and defend its life, upon the occurring of so fearful a calamity as an attack from those who have been nurtured and fed by its patronage and power. This wisely planned instrument does not trust the lives and fortunes of a great and loyal people to tardy legislation or other dilatory action, but recognises parricide, under the name of "rebellion," as so heinous and diabolical a crime, as to require, on the *instant*, the most absolute power and energetic action to preserve, protect and defend the existence of a Government based upon those

cherished principles of human liberty which have made this country the chosen asylum for the oppressed of all the earth.

During the existence of "rebellion," if a writ of *habeas corpus* is applied for, the Judge should answer, "I have no authority to grant the writ, as rebellion exists," and if any Court shall issue the writ, the person holding the prisoner should answer, "Rebellion exists, and I hold the prisoner by authority of the President of the United States."

If the President should attempt to make arrests when rebellion does not actually exist, and should disregard the privilege of the writ of *habeas corpus*, the fact being legally established, would subject him to impeachment by the House of Representatives.

The positive refusal of the Constitution to place the liberty of the citizen in the custody of Congress, is one of the most valuable features in that wonderful instrument. It was this power that rendered the long Parliament in England, and the Convention of the French Revolution so cruel and intolerable. But our Fathers have made our Constitution capable of meeting all emergencies. It so *expands* itself upon the occurrence of rebellion as to *create* the power necessary to protect its own existence.

It gives to the President the command of the Army and Navy of the United States, and the *acts* of the rebels *actually* clothe him with absolute power over life and liberty, and thus enable him to deal them a more deadly blow; and when the rebellion ceases, or is overcome by the power placed by the Constitution in the hands of its chosen champion, the *occasion* has passed for the use of such absolute power, and then, without an act of Congress or Presidential proclamation, all the Departments of Government resume their ordinary duties, while the great liberty-protecting writ will assert the supremacy of the *Judiciary* over the *Executive* in the jealous protection of the personal liberty of our people. Thus, I think this paper will not only show that the Constitution has conferred no power upon any Department of this Government to suspend the privilege of the writ, but that the course pursued by the President in the arrest and imprisonment of suspected persons is not only right, but in compliance with an imperative duty undertaken by a solemn oath, to the "best of his ability to preserve, protect and defend the Constitution of the United States."

This letter is not written as a legal opinion, but as the outline of my views on this part of the Constitution; and, although hastily composed, I trust will be found to establish the fact that the great and good men, who framed this remarkable instrument to make a people contented and happy, did not render it *necessary* that any one should violate the Constitution to *preserve* the Constitution—and did not fail, in their jealous care for personal liberty, to embrace in the Constitution the *right and power* of self-defence against perjury and assassination, dignified by the name of secession. Respectfully, your obedient servant,

SILAS M. STILLWELL.

9/23/1861

SUSPENSION OF THE HABEAS CORPUS.

**By the President of the United
States of America.**

A PROCLAMATION.

Whereas it has been necessary to call into service not only volunteers, but also portions of the militia of the States by draft in order to suppress the insurrection existing in the United States, and disloyal persons are not adequately restrained by the ordinary processes of law from hindering this measure, and from giving aid and comfort in various ways to the insurrection, now therefore be it ordered:

1st. That during the existing rebellion and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to the rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commission.

2d. That the writ of habeas corpus is suspended in respect to all persons arrested, or who are now or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison or other places of confinement, by any military authority or by the sentence of any court martial or military commission.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at Washington this 24th day of September, of the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

(Signed) ABRAHAM LINCOLN.

By the President.

WILLIAM H. SEWARD, Secretary of State.

*London Transcript
Sept 25, 1862*

Jeff. to Abolish Slavery
Recognition.

IN GEORGIA.

verse Near Lafayette.

AVY FREIGHT TRAINS.

MY OF THE POTOMAC.

red to Dispute the Passage
J. E. B. Stuart and his Ca-
Inquirer.

t. 17.—Advices from Culpeper
st night, from your correspon-
of the Potomac, represent the
to dispute our passage of the
all the force they possess. They
e morning to throw troops over
approached the river in three
with artillery, but our cavalry,
them back.

er report that the Rebel army,
a Pennsylvania, remained only
that vicinity. Since then they
ine of the Rappahannock with
J. E. B. STUART had his head-
nearly all the time.

TION OF LITTLE ROCK.

n Rapid Retreat.

—Rear Admiral PORTER has re-
tating that Little Rock was occu-
KLE on the 10th inst., without
any consequence.

d of the Rebels is rapidly retreat-
deon is in hot pursuit.

ehine, from New Orleans, with
ant has arrived.

n anticipated. She has on board
of cotton belonging to the Go-
Memphis.

FROM ROSECRANS' ARMY.

ie South—Johnston Said to
ed Bragg—Rosecrans being

15.—A large infantry force from
is reported marching up the Tus-
reinforce BRAGG. RODDY's com-
Decatur for some purpose.

reports circulating in the South
for two days' fighting, in which
ed and driven back, he received
in from JOHNSTON, which turned
, and that he was now driving

n's cavalry are reported to have
h the design of destroying Rose-
crans.

The delegates recently appointed by the Con-
vention held in Jefferson City, to proceed to Washing-
ton, in order to make such representations to the
Federal authorities as will produce a change of the
military commander in the Department of Missouri
are daily expected, therefore no action has yet been
taken by the President in the premises. In the
event of the removal of General SCHOFIELD, Mis-
sourians now here think it not improbable that
General BUTLER will succeed to the command.

Increased Railroad Facilities.

Representatives of railroad interests now here say,
that the construction of the bridge over the Susque-
hanna River is now progressing vigorously. The
entire length will be 3500 feet. Thirteen stone piers
are cased in iron, some of which are sunk in water
forty-three feet deep. The great pier will be sunk
this month, and the others finished before January.
Both abutments will be completed before next spring,
and probably all the pile foundations this autumn.
The piers are two hundred and fifty feet apart. There
has been great difficulty in procuring labor, and as a
consequence there have been unavoidable delays.
The bridge will cost about a million of dollars.

On the 1st of October the Philadelphia, Wilm-
ington and Baltimore Company will be running a
double track to Newport, thirty-five miles from
Philadelphia, and the work toward Baltimore will
be continued until it is successfully completed.

It is expected that by the meeting of Congress
there will be a double track between Baltimore and
Washington. A double track is in course of con-
struction between Philadelphia and New York. The
junction of railroads in Philadelphia will be in a
condition, by the 1st of December, to run cars
through from Washington to Jersey City, wit-
out change of cars. Phil. Inquirer, Sep 18, 1863

The Suspension of the Habeas Corpus.

The Secretary of War has ordered that the act of
Congress relating to the suspension of the writ of
habeas corpus and Proclamation of the President,
based upon the same, be published for the informa-
tion of all concerned, and that the following special
instructions for persons in the military service of the
United States be strictly observed, namely:—

The attention of every officer in the military ser-
vice of the United States is called to the proclama-
tion of the President issued on the 15th day of Sep-
tember, 1863, by which the privilege of the writ of
habeas corpus is suspended. If, therefore, a writ of
habeas corpus should, in violation of the aforesaid
proclamation, be sued out and served upon any offi-
cer in the military service of the United States, com-
manding him to produce before any Court or Judge,
any person in his custody by authority of the President
of the United States, belonging to any one of the
classes specified in the President's proclamation, it
shall be the duty of such officer to make known by his
certificate, under oath, to whomsoever may issue such
writ of habeas corpus, that the person named in said
writ is detained by him as a prisoner, under the au-
thority of the President of the United States, such re-
turn having been made, of any person serving or at-
tempting to serve such writ, either by the command
of any court or otherwise, and with or without
process of law shall attempt to arrest the officers
making such return and holding in custody such per-
son, the said officer is hereby commanded to refuse
submission and obedience to such arrest, and if
there should be any attempt to take such person from
the custody of such officer, or arrest such officer, he
shall resist such attempt, calling to his aid any force
that may be necessary to maintain the authority of
the United States, and render such resistance effec-
tual.

JAMES B. FRY,
Provost Marshal-General.

Blockade Runner Captured.

To-day, the schooner *Robert Knowles*, Captain
OWTAW, arrived here as a prize, having been taken
by the Potomac flotilla, off Cockpit Point, Va., on
the charge of violating the blockade. She had cleared
from Alexandria for Lewes, Del. It is important
for shippers to know that vessels under the present
regulations, although clearing from Alexandria to
another loyal port, cannot land on the Virginia
shore, as in the above case, without violating the
blockade, unless a special permit has been granted
for that purpose.

by the enemy at Culpeper is here looked upon as a
strategic movement, done to induce us to make a
general movement in that direction, that they may
be better enabled to carry forward an operation that
they are making on our right, said operation looking
very much like another invasion of Maryland and
Pennsylvania.

WHITE's guerrillas are known to be hovering about
the Potomac, and a part of WADE HAMPTON's
Cavalry are within supporting distance of them,
making a cavalry force of not less than five thousand
men, while still further south the same movements
are being made by the other branches of their ser-
vice as were made previous to the last invasion of
the loyal States. There are none who believe that
there will be on their part as general a movement as
the last, but that force enough will be sent to create
confusion at the time of your election.

These "blinds," faints of movements and efforts to
distract our attention from the mischief they have in
prospective, in no way mislead our General MEADE
on the contrary, he is at all times on the qui vive
knows full well what are their doings along the
whole extent of his line of operations, and, conse-
quently, is not to be coaxed into a disastrous move-
ment. On the contrary, he has his whole command
in splendid order, "has the reins well in hand," and
is prepared, at a moment's notice, to meet and defeat
any and every movement, no matter upon what
part of their line it may be made, and, at the same
time, is prepared to strike whenever the occasion
offers, and where a point may be gained.

The report going the rounds of the Northern papers
that from LEE's army reinforcements are being sent
to BEAUREGARD and BRAGG, is said, by those who
here should be well informed, to be a fabrication.
It is known that they are numerically as strong,
not stronger, now than at any time since the battle
of Gettysburg; what they have lost by desertion
they have gained by conscription. It is true that
opposite a portion of our command they have fallen
back a considerable distance, and enabled us to
quietly occupy Culpeper. This may have induced
the belief that a portion of their forces were be-
detached, and doubtless is the cause of the rumor.

We are unable to learn positively as to the extent
of our losses in the skirmish on Sunday; we are told,
though, that they are but trifling.

Three pieces of cannon were taken from
enemy. The first lot of prisoners sent
amounted to forty; they to-night number one hun-
dred and eighty, two-thirds of whom might
be classed as deserters or willing prisoners. The cap-
tured are the best make of English pieces,
brass howitzer and two Napoleons.

To-day the railroad trains are running to Bra-
ggs Station, and to-morrow will be running to Cu-
lpeper.

General FLEMINGTON, with a portion of Grant's
cavalry, to-day pushed on down the railroad as
far as Mitchell's Station, a mile or two north of
Rapidan, and learned to a certainty that upon the
southern bank of the stream the Rebels are in
force and strongly fortified, and to such an extent
to encourage the belief that they there mean to
fight.

Promotions

Are now the order of the day, and we know of no
more justly deserved than that of Captain EDWARD
F. COOK, of the Twelfth Massachusetts regiment,
that of Major of same regiment. Captain COOK
a long time past has occupied the position of Pro-
vost Marshal of General ROBINSON's Second Divi-
sion, First Corps, and so admirably has he filled the
duous duties appertaining to that position as to
the highest encomiums from his superior officer.

Honor to Whom Honor is Due.

Writing of promotions reminds us of the fact
that the gallant JOHN C. ROBINSON still remains a
Major-General. It is a case where downright,

sale of Scranton coal, of the Delaware Western Railroad Co. took place at prices ranging from \$5 to size and quality.

of the Book Trade Sales. The infar, to-day, include those of MAR-ROBERTS BROS., WALKER, WISE & of Boston; CLARK, MAYNARD and s city. These books were mostly nile character, and realized satis- fidence of the trade has been very

by Hon. Geo. W. Jones, formerly from Iowa, and Minister at Bogota, in Secretary SEWARD for imprison- tta. came up in the Supreme Court, this morning, on a motion to have the Circuit Court of the United l be given in a day or two. It will e the application.

amship Company's screw steamer anched from the Green Point ship

, a well-known merchant of this g, at the residence of his son, at t, in the eightieth year of his age, t the principal auctioneers of this

concluded, after all, that it would t sharp practice of the Directors of a Railroad pass, without some word olution was adopted this afternoon, t giving sufficient publicity to their

great ferment this forenoon, owing disasters to General ROSSCHAKS one of the morning papers on an on authority. The failure of a heavy me influence in the same direction. r had the news, gold jumped up 4 the day, when the decision on the known, declaring greenbacks legal ed.

Gold and Exchange had a marked ce markets, and everywhere higher Breadstuffs were all higher and in advanced 10@15 cents per bbl.; ent per bushel. In provisions there ne in Pork at full rates. Lard was Butter and cheese were firmer, ith an increased demand, in part for criptions of domestic produce were y cases higher.

continues easy at 3 3/4 cent. on call, firmer, but the market is very dull, s 1/2 nominal at 157@157 1/2. American cent. higher, but the market is very ar. opening at 4 1/4, advancing to 4 1/2, losing quiet at 4 3/4 cent. premium. are firm. United States 6's, 1881, -thirty Treasury Notes, 106 1/2@107 1/2. and closed heavy. Michigan South- advanced 1/4; New York Central 3/4; nd Illinois Central 3/4 cent.; Hud- Michigan Southern Guaranteed 1/4; n Preferred 3/4 cent.

OK SALES—SECOND BOARD.

10. 107	200 sh Mich. Cen. R. RR. 121 1/4
10. 108	700 do. 120 1/4
10. 109	50 do. 120 1/4
10. 110	100 sh Cle. & Pitts. RR. 90 1/4
10. 111	700 do. 90 1/4
10. 112	500 do. 100
10. 113	200 sh Gal. & Chica. RR. 100
10. 114	100 do. 100 1/4
10. 115	200 sh M. & N. In. 75
10. 116	100 do. 75 1/4
10. 117	100 do. 75 1/4
10. 118	100 do. 75 1/4
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10. 199	100 do. 75 1/4
10. 200	100 do. 75 1/4

reported by Star N. Toland. Ea- 100@104 1/2. Reading, 110@111 1/2. Michigan Southern, 75 1/4

by Colonel Moss' men.

St. Louis, Sept. 29.—The Democrat's Leavenworth special despatch says authentic advices have been received there from Washington, to the effect that Kansas will be made a separate department, under the command of General CURTIS.

Colonel Moss' men are disarming the loyal en-rolled militia of Platte county, and several Union men were killed yesterday, and a perfect state of terror exists there.

The Democrat's special despatch from Springfield says that it is stated and believed among the army men, that Major-General PORR will be assigned to the command of the Department of Missouri.

Governor YATES leaves, to-night, for Ohio, where he will speak to the Union men.

General PORR is now in St. Louis. Phil Inquirer Sept 30, 1863, P. 4

MORE ARRESTS FOR DISLOYALTY.

Capture of a Secession Publisher—The Editors Vameco—The Five-Twenty Loan, &c.

Special Despatch to the Inquirer.

BALTIMORE, Sept. 29, 1863.—A military provost guard went to the office of the *Daily Gazette*, the Secession newspaper here, and arrested Mr. CASTER, principal publisher, and took him to Colonel Fish's lock-up, where he will remain until to-morrow for further investigation. Mr. NELSON and Mr. CARPENTER, the other two editors, were invisible, otherwise they also would have been arrested. The officers are still after them. The *Gazette* office is now closed, and under military guard. The allegations are believed to be charges of disloyalty and general opposition to the Government. This journal was wholly supported and patronized by sympathizers with the Rebellion. It is supposed that the editors will be finally sent South when they are all caught. The affair causes much sensation among Secessionists.

Subscriptions to the Five-twenty loan are increasing rapidly here, and it is in great demand. The gold excitement runs high.

The following parties were also arrested by the military to-day:—MICHAEL G. KELLY and N. B. PIET, of the firm of HEDIAN & PIET. The charge is for selling the publication entitled "Fourteen Months Experience in the American Bustle," by FRANCIS KEY HOWARD. Phil Inquirer Sept 30, 1863, P. 4.

Greenbacks Decided to be a Legal Tender.

ALBANY, Sept. 29.—In the Court of Appeals to-day judgment was affirmed in the case of the Metropolitan and Shoe and Leather Banks against Mr. VAN DYCK, Superintendent of the Bank Department.

Judgment was reversed in the case of MYER against ROSEVELT.

These decisions decide that "greenbacks" are a legal tender.

It is understood that the Court stood six to two, Judge DENIO and Judge SILDEN dissenting from the decision.

Pirates in Chesapeake Bay.

NEW YORK, Sept. 29.—The schooners *Ireland* and *John J. Houseman* were captured by the Rebels, in the Chesapeake Bay, previous to the 28d instant, plundered and set adrift.

The schooner *Alexandria* was captured, plundered and run ashore.

The Government schooner *Allanore*, laden with provisions and sutlers' stores valued at \$80,000, was also captured. The crews of the other vessels were put on board of her, and she was last seen off Sand Shoals, bound South.

The National Crisis.

Boston, Sept. 29.—Miss ANNA DOCKINSON addressed a very large and attentive audience here this evening, for

General BUONITA had started from the frontier of Hayti, on his return to Santiago. He had had several skirmishes with the Rebels, generally beating them, but arrived at Santiago with only a few orderlies, owing to the heat and fatigue. It is reported that he has since united his force with Colonel CAMPBELL's and given battle to the Rebels, routing them.

The Rebels are accused of having entered undefended towns and murdered the defenseless men and sick soldiers. They are reported to infest the woods, which are thereby rendered unapproachable. Report says the Spanish troops have been ordered to set the woods on fire and burn them out.

ANOTHER DRAFT PROBABLE.

Examination of Drafted Men—The Missouri and Kansas Delegations.

Correspondence of the N. Y. Evening Post.

WASHINGTON, Sept. 28, 1863.—The reverse of Northern Georgia compels the Government to raise more troops than it had contemplated. The present draft will not give the Government over seventy-five thousand men, and it is said in some quarters that this estimate is too high by twenty-five thousand. Another draft will undoubtedly take place very soon, except in those States which prefer to raise the full quota, and can do it, by volunteering. Nearly all the Western States will raise their quotas by volunteering, as the Government offers a bounty of three hundred dollars.

Examination of Drafted Men.

The War Department is convinced that it has made one mistake in reference to the draft. It has permitted its surgeons to be too particular in the examination of drafted men. The Department finds that where it has had poor surgeons, yet men of practical sense, it has obtained most men, and where the most skillful and exact surgeons have had the handling of drafted persons, the Government has fared badly.

The next draft will probably be for six hundred thousand men, and the expectation of the Government will be, under new instructions, to obtain one-third of the men drawn as soldiers. The two drafts and the volunteering, it is estimated, will give about three hundred thousand men by the 1st of next January. This will do very well, under the circumstances.

Reception of the Russian Naval Visitors.

PREPARATIONS BY THE CITY AUTHORITIES—THE FIRST DIVISION OF STATE MILITIA TO PARADE.

NEW YORK, Sept. 29.—The officers of the Russian vessels of war in our harbor are to have a grand reception on Thursday. The Committee of the City Councils will wait on the Russian Admiral, and present the resolutions of welcome. They will be accompanied on their return by the Admiral and officers, and landing at some point up town, will pass down Broadway to the City Hall, escorted by the entire First Division of the State Militia.

Boston, Sept. 29.—The Board of Aldermen have passed resolutions inviting the Russian officers at New York to accept of the hospitalities of the city of Boston.

Temperance Celebration.

NEW YORK, Sept. 29.—The twenty-first anniversary of the establishment of the Order of Sons of Temperance was celebrated to-day. A large and enthusiastic meeting was held at the Cooper Institute this evening. The special session of the National Division was held during the day, at which delegates were present from the States and British Provinces. The meeting was the largest ever held for many years.

A Fire Seen near Charleston.

NEW YORK, Sept. 29.—The transport steamer *Constitution* has arrived from Hilton Head. When at Charleston her officers saw a large fire, but from the distance could not tell whether it was in the city or from a vessel in flames.

Arrival of the "Arago."

NEW YORK, Sept. 29.—The steamer *Arago* has arrived from Charleston bar, with dates to the 30th. She brings no news. Among her passengers is C. H. HOLLOWELL.

Large Sale of Coal.

NEW YORK, Sept. 29.—Twenty-five thousand tons of Scranton coal were sold at auction to-day, prices ranging from \$6.95 to \$7.55 per ton.

How the Suspension of Habeas Corpus Works--Another Outrageous Case of Kidnapping.

We are made acquainted with the particulars of another outrageous case of kidnapping, which serves to illustrate the utterly defenceless condition to which the citizen is left by the suspension of the *habeas corpus* privilege. Charles Wippert, the victim of the outrage, is a young German, who, for the greater part of a year past has been employed as a clerk, we believe, in the store of M. L. Comstock & Co. His family have resided here for many years past, and are well known. One brother, Charles William Wippert, is also in Comstock & Co.'s employ.

A week ago last Saturday, young Wippert was arrested by order of Provost Marshal Scroggs, on the charge that he was a deserter from the 3d Ohio Cavalry. He was taken to the county jail, and there kept in one of the poorest cells in that institution, till Thursday morning, when he was sent to Elmira. The arrest which was accomplished, we understand, by Lieutenant Colonel Austin, an *attache* of the Marshal's office, was said to be made on the strength of an order from Toledo.

Immediately after the sudden and mysterious taking off of his brother, Mr. C. W. Wippert made every effort first to find out the reasons for the arrest, and second to obtain his release. The information received at the marshal's office was not at all satisfactory, and application to legal authorities speedily elicited the fact that for this outrage there was actually no remedy in the law of the land. A prominent Republican lawyer who was consulted advised personal application to the President as presenting a possible chance for justice.

It does not appear that there is the slightest proof that Wippert is the alleged deserter whose description was forwarded from Toledo. That description, Col. Austin is said to have admitted, represented the deserter as an Englishman and a mechanic. Wippert is neither. Moreover, Mr. Wippert stoutly maintains that he never has been in the army at all, nor have his brothers ever had reason to think that he had enlisted. On the strength simply of some shadowy resemblance between Wippert and the real deserter, the former has been hurried by force into military confinement, his friends being powerless to help him. We are told that after the prisoner was sent to Elmira, Col. Austin himself expressed grave doubts as to his being the proper man.

These facts need no comment. They are almost incredible. They mean, reader, that you or we, or any man, is liable at any moment to be arrested, dungeoned, and spirited away, and that, too, in spite of all law and justice, and entreaties or influence of friends. A premium of thirty dollars is paid to the Federal official who may make such an arrest, and if he has the desire to make money in this way, he has unlimited power to gratify that desire, by invading the sanctity of our homes and trampling upon the dearest rights which freemen can possess. Of course, it is not likely that well known or influential citizens will be thus pounced upon; but is the atrocity less atrocious because perpetrated perhaps upon some poor citizen who is friendless, moneyless and unknown? Such cases are actually transpiring in our midst almost every day. Every effort is being made to keep them secret, but the facts are leaking out, and we shall be able to make still other exposures. Is anything more required to make the people pause and think whither we, American citizens are drifting?

Philadelphia

Oct. 16, 1863



Lincoln Lore

July, 1975

Bulletin of The Lincoln National Life Foundation...Mark E. Neely, Jr., Editor. Published each month by The Lincoln National Life Insurance Company, Fort Wayne, Indiana 46801.

Number 1649

A Philadelphia Lawyer Defends the President

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." This one sentence is the sole mention of the writ of *habeas corpus* in the United States Constitution. Before the Civil War, it had figured only rarely and briefly in the country's seventy-odd years of constitutional disputes and controversies. In 1807, President Thomas Jefferson became sufficiently alarmed over the Burr conspiracy to ask Congress to suspend the privilege of the writ for a period of time. Behind closed doors, the Senate passed a bill to

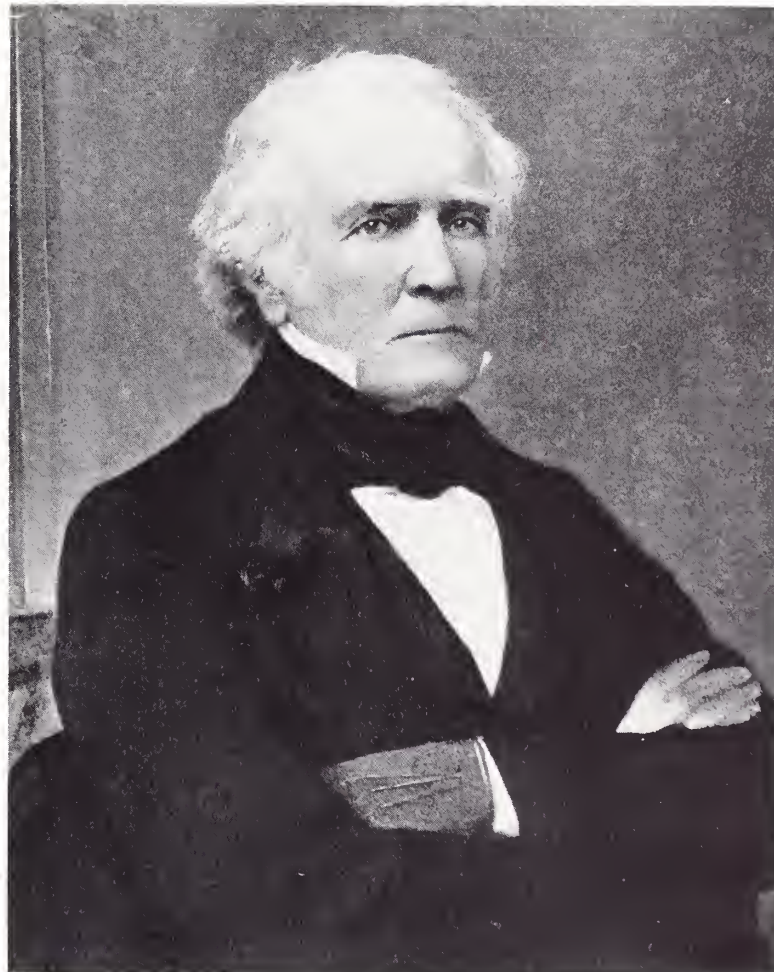
suspend for three months, but the House rejected the bill by a large majority. Chief Justice John Marshall, in a case which also stemmed from the arrest of an alleged member of the Burr conspiracy, *Ex parte Bollman*, said "that if at any time the public safety should require the suspension of the power" to issue the writ, "it is for the Legislature to say so. That question depends on political considerations, on which the Legislature are to decide." Finally, one of the great commentators on the United States Constitution, Judge Joseph Story, said rather tentatively, "It would seem, as the power is given to Congress to suspend the Writ of Habeas Corpus in case of Rebellion or Invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body."

There was nothing in the history of the use and interpretation of the *habeas corpus* clause in the Constitution to prepare the country for President Abraham Lincoln's suspension of the privilege of the writ of *habeas corpus*, which

occurred as early as April 27, 1861. The issue was brought to public attention by the case of one John Merryman, who lived near Baltimore and was arrested on suspicion of being the officer in charge of a pro-secession Maryland military unit, of being a party to destroying railroad tracks and bridges to prevent loyal troops from reaching Washington, and of obstructing the United States mails. The Chief Justice of the United States Supreme Court, Roger B. Taney, also sat as a circuit judge in the Maryland federal court, and he issued a writ of *habeas corpus*. The military officer who had arrested Merry-

man refused to present Merryman to the court on the grounds that the President had suspended the privilege of the writ. Taney then wrote an opinion—as a circuit judge, not as the Supreme Court's Chief Justice—which claimed that President Lincoln could not suspend the privilege because Congress, like Parliament in England, alone possessed that power. Lincoln and Attorney General Bates ignored the opinion.

Most of the authorities in print to that date and the Chief Justice of the Supreme Court thus argued that Lincoln could not do, constitutionally, what he had done. The President badly needed some legal opinion supporting his position. The Attorney General supplied one, but most authorities, then and ever since, agree that it was sloppily done and poorly argued. Joel Parker, Royall Professor of Law in the Harvard Law School, supported the President in an article for the prestigious *North American Review* entitled "Habeas Corpus and Martial Law." Parker, who would become a foe of the President after he issued the Emancipa-



From the Lincoln National Life Foundation
FIGURE 1. This portrait of Horace Binney, copied from a photograph, pictures him as he must have looked about the time he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution*. The portrait appears in Charles Chauncey Binney, *The Life of Horace Binney with Selections from His Letters* (Philadelphia: J.B. Lippincott, 1903).

tion Proclamation, argued broadly that in time of "paramount military obligation . . . the military law must be held to supercede the civil." Parker's argument was broader than it needed to be, for suspending the *habeas corpus* privilege subjects the party only to arbitrary arrest and confinement; it does not subject him to martial law and thus to trial by military tribunal rather than by jury in a civil court. President Lincoln was still in need of a persuasive defender who could sift the constitutional authorities and, in a rigorous way, supply a logical constitutional argument for the Executive's power to suspend the writ of *habeas corpus*.

1. A Conservative Admirer of Lincoln

The argument Lincoln needed came from an odd source, a conservative octogenarian lawyer from Philadelphia named Horace Binney, a man who had largely avoided political disputes for some thirty years. The President did not seek him out, but Francis Lieber, a German immigrant who became America's greatest early student of politics and probably her first professional political scientist, did. Lieber, who himself wrote many pamphlets encouraging loyalty during the Civil War, urged Binney to publish a pamphlet on the subject of the *habeas corpus*. Binney was interested in the question because he doubted the validity of the arguments he had seen, because he believed heartily in the Union cause, and because he was an admirer of President Lincoln.

Horace Binney was a rather unlikely Lincoln admirer. Born in 1780, he was a generation older than Lincoln. He attended Harvard College and graduated with high honors in 1797. He studied law with Jared Ingersoll in his home town, Philadelphia, and gained admittance to the Philadelphia bar in 1800. He served one term as a legislator elected on a fusion ticket of Federalists and Independent Democrats. Thereafter his law practice amidst the burgeoning commerce of Philadelphia became very lucrative. He became a director of the first United States Bank. In 1832, he ran successfully for Congress, this time as an anti-Jackson candidate (and with the understanding that he would not have to support Pennsylvania's pet interest, the protective tariff; that a vote for him should be considered only a vote against Andrew Jackson; and that he would not be bound to act with any party in Congress). There he became rather embittered against party politics; "the spirit of party," he said, "is a more deadly foe to free institutions than the spirit of despotism." He retired for the most part from active court work twenty-four years before the Civil War began, and, although he wrote several eulogies and an historical piece on the authorship of Washington's Farewell Address, he was little involved in political questions until the war broke out.

Binney disliked democracy, whether with a small or a large "d," and he opposed the provision of the Pennsylvania Constitution of 1838, which made the tenure of the state's judges a period of years rather than during good behavior. He was a rather crusty Federalist as long as that party existed. He always hated the Democratic party, but he had his reservations about the Whigs as well, especially insofar as their leaders, Henry Clay and Daniel Webster, practiced the political arts to gain the Presidency. Writing, appropriately enough, to Alexander Hamilton's son, J.C. Hamilton, in 1864, Binney accused Clay and Webster of caring "nothing about true fame" and of wanting "only . . . to get on the top of the pillar, like Simeon Stylites, to be looked at with upturned eyes by the people, and to be fanned with the *aura popularis* from all quarters of the heavens." He concluded:

These aspirations for the President's office are to me a wonder and an astonishment, and I sometimes think that the most decisive argument against a republic is that it fools and dwarfs the best minds in the country, by directing their hearts towards the vain, ephemeral show of the first office in it, to be obtained by popular arts and intrigues; and the saving feature of a monarchy is its permanent, though personally insignificant, head, which compels men of great minds from thinking of the pinnacle, and drives them to work for their own fame in the elevation and consolidation of their country. . . .

Thus Binney was a true old Federalist who never quite adjusted himself to the age of the common man which flowered with Jacksonian democracy. His biographer, Charles Chaun-

cey Binney, noted perceptively that it was Binney's dislike of democracy that made him the enemy of the Democrats without really being the friend of the Whigs.

Mr. Binney's opposition to the Democratic party was due to its having made democracy its fundamental principle from the start, but he was well aware that after the passing of Federalism, the democratic spirit affected all political parties. Writing about 1840, he said, "The Whigs are at this day more democratic in their devices and principles than the Democrats were in the days of Jefferson. There are few or no sacrifices of constitutional principle that the Whigs will not make to gain power, as readily as the Democrats. . . . they have entered into full partnership with those who trade upon the principle that the people are all in all, that their voice is *vox Dei*, that the masses are always right, and that nothing else is fundamental in government but this. What the Whig affix means, I think it is difficult to say. . . . The only question is how to obtain most of the sweet voices and emoluments of government, and this is as much a Whig object as a Democrat object, and there is no obvious or characteristic difference in the nature of their respective bids."

Binney explained his political philosophy, as opposed to his party principles, to his British friend J.T. Coleridge in 1863, "I have a horror of democracy as the radical principle of a government, . . . while I am as firm a friend of free government as any man that lives." Here reconciled the two seemingly divergent beliefs by invoking the age-old idea that representatives were responsible to God, though chosen by the people:

That the people are the final cause and the Constitutional origin of all power among us is true. . . . But the moral source of all power, which is also the source of the people, has respect to the ends and purposes, the sure establishment of freedom as well as its diffusion, [and] the people as people are not the true source of it, but God above, and the moral qualities with which His grace imbues some and not all men. Virtue, reason, love for mankind, which come from the eternal source of all power, have better right to exercise it than man simply. . . . His moral qualities are his true title; and therefore, while I admit him to be the final cause of political power with us, I do not admit him to be the efficient cause of power in government.

He recognized equality of opportunity for political distinction but not equality of capacity and therefore required "siftings, distinctions, and qualifications, in all preparations for the exercise of political power. . . ."

Despite the dominant anti-democratic theme in his long life, Binney found much to admire in the railsplitter whose skillful practice of the political arts brought him to the Presidency in 1861. He apparently knew little or nothing about Lincoln before he assumed the office, and he therefore judged the President by his acts. Binney liked what he saw. In March of 1861, he discussed Lincoln's Inaugural Address with Coleridge:

. . . I hope you will agree with me that it is a plain, sensible paper, expressing right doctrines as to the perpetuity of the Constitution, the unlawfulness of *secession*, and the duty of enforcing the laws; and in a kind temper, tho' with all requi-

FIGURE 2 (facing page 2). Horace Binney's pamphlet appears in the upper left hand corner. Judge S.S. Nicholas of Louisville, J.C. Bullitt* of Philadelphia, George M. Wharton* of Philadelphia (in two pamphlets), Tatlow Jackson,* Edward Ingersoll of Philadelphia, John T. Montgomery* of Philadelphia, C.T. Gross, William M. Kennedy, Isaac Myers,* and James F. Johnson* answered it. Sydney George Fisher's "Suspension of Habeas Corpus During the War of the Rebellion" identifies the author of the pamphlet shown in the lower left-hand corner as David Boyer Brown; previous owners have identified it on the cover as Frank Taylor's pamphlet. Wharton's and Montgomery's answers are also pictured. Asterisks (*) indicate pamphlets in the Lincoln National Life Foundation collection.

THE PRIVILEGE
OF THE
WRIT OF HABEAS CORPUS
UNDER
THE CONSTITUTION.

By Horace Binney,

Formerly, Philadel.

WRIT OF HABEAS CORPUS,
MR. BINNEY.

SECOND EDITION.

SECOND EDITION.

PHILADELPHIA
JOHN CAMPBELL BOOKSELLER
110 CHRISTIANITY STREET
1862

REPLY TO HORACE BINNEY
Author of The Privilege
from S. Taylor
THE PRIVILEGE
OF THE
WRIT OF HABEAS CORPUS
UNDER
THE CONSTITUTION.

BY
A MEMBER OF THE PHILADELPHIA BAR.

PHILADELPHIA,
JAMES CHALLEN & SON, PUBLISHERS,
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1862.

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REMARKS
ON
MR. BINNEY'S TREATISE
ON THE
WRIT OF HABEAS CORPUS.

G. M. WHARTON.

SECOND EDITION.

PHILADELPHIA
JOHN CAMPBELL BOOKSELLER
110 CHRISTIANITY STREET
1862

site firmness, declaring his purpose to administer his office with fidelity, and with effect as far as the country shall supply the means. I should think, and this is the common opinion, that the paper has been written by himself; and that it is a proof of a plain, sound mind, free from any disposition to press what he thinks right with much rigour, or what he thinks wrong or plainly expedient, from mere fidelity to party; the best temper, perhaps, for our country. His reasoning upon disputed points, where I have examined it with attention, appears to be accurate, and his heart kind. He is generally regarded as a cordial man, not highly educated, but of good reasoning powers, and both calm and brave. On the whole, I like his début. The people will understand him; and that is a great point with us.

Nine months later, Binney was still describing the President in radiant hues for his English correspondent, though with the customary reservations about Lincoln's physical appearance.

The character of this

President has come to be received by nearly all among us (the free North and West) as very frank, unaffected, and honest. I recollect no President, who was so little known when he came into office, who so soon, and in times of vast difficulty and very general self-seeking, as well as of great devotion to public service, has acquired a very full confidence of the people for these qualities. He seems to be an entirely sincere and honest man. He does not appear to think much of himself, but is disposed to give all he has, and is, to the country; and to shew himself always in his own clothes. Perhaps he might get handsomer; but we have been so much annoyed by pretensions in some of our Presidents, that we are not sorry to see a little more of the undress or natural style.

In March of 1862, after the Trent Affair, Binney favorably explained the President's role to Coleridge, who was naturally interested in the strained relations between the United States and Great Britain.

We feel, I think, more kindly towards England since the settlement of the Trent affair; and perhaps Mr. Seward—I ought to say the President, for he is not thought to be a cipher in such matters—did well in not announcing too promptly his purpose or inclination to the people. He gains daily upon all of us, in the great attributes of integrity, a

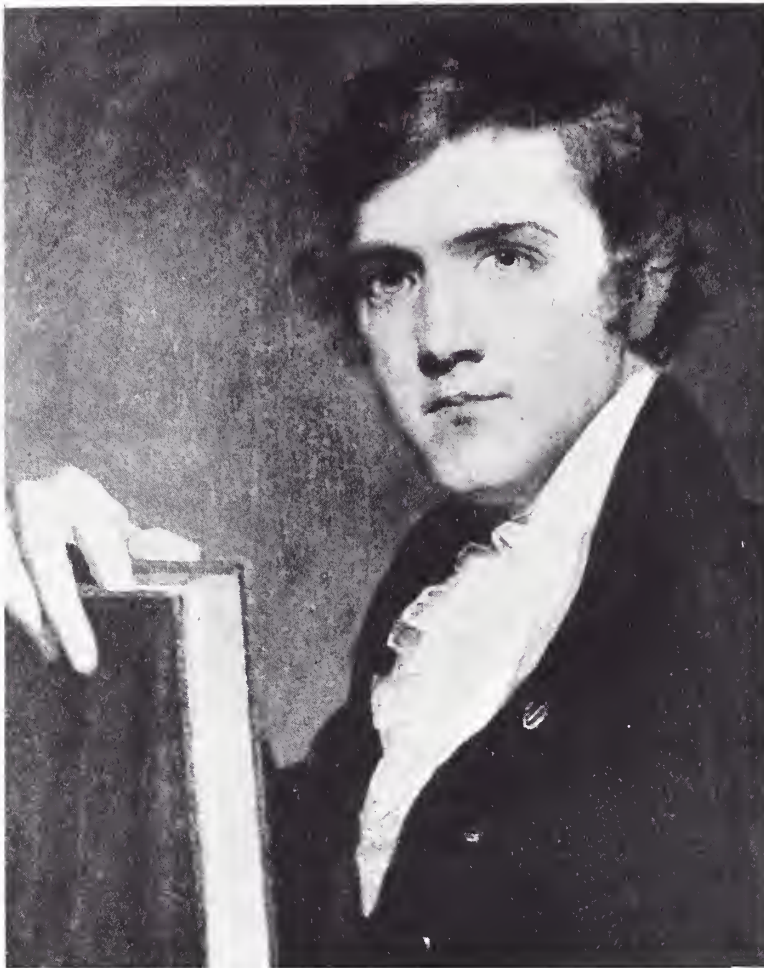


FIGURE 3. Proof that Horace Binney's career bridged two widely separated eras lies in comparing this portrait with the one on the cover. This portrait was painted by Gilbert Stuart in 1800. When the painter was told that he had put the buttons on Binney's coat on the wrong lapel, he said, "Have I? Well, thank God! I am no tailor." Then he changed the coat to a double-breasted model. The color (which is claret) Stuart made up because it went well with Binney's complexion; Binney never owned a coat that color. A reproduction of the portrait appears in Charles Chauncey Binney's *Life of Horace Binney*.

love of justice, clear good sense, untiring industry, and patriotism. He also is thought to know the people, which is a great matter, as he came in without the reputation of being able to lead them by command.

2. *The Privilege of the Writ of Habeas Corpus under the Constitution*

Fortunately for President Lincoln, Horace Binney was at his lawyerly best when, in the autumn of 1861, he wrote *The Privilege of the Writ of Habeas Corpus under the Constitution*. This is not to say merely that the Philadelphia lawyer's argument was ingenious, though many constitutional students at the time and ever since have recognized it as such, but that he eschewed unnecessary *dicta* which might have sat poorly with his jury. The jury which judged Lincoln was the American people, and they would not have taken kindly to Binney's old Federalist beliefs, to his uneasiness with democracy, and to his desire for government by those who had been sifted from the common herd by educational distinctions and conservative moral qualifications.

Lincoln's prosecutors, the Democratic politicians, would have had a field day had the ancient Philadelphia lawyer voiced the sentiments in the pamphlet which he voiced in his private letters to Alexander Hamilton's son and to skeptical British conservatives. The Democrats were having trouble distinguishing themselves from the Republicans anyway. They supported the war for the Union as much as the Republicans did, and Lincoln had not yet provided them with an issue by turning it into a war for the freedom of the Negro. Their traditional appeals to the economically disaffected had little appeal in the midst of war-induced economic prosperity. All that was left to them was the issue of civil liberties, and this would have been powerful indeed had the President's defenders justified the suspension of the privilege of the writ of *habeas corpus* as suitable discipline for an unruly democracy. As it was, Democrats would attack the suspension and Binney's defense of it time and time again, but the nature of his argument often confined them to narrow constitutional grounds and denied them any *ad hominem* argument that only crusty old Federalists supported such things in the tradition of the Alien and Sedition Acts of John Adams.

Binney's argument was strictly, which is not to say narrowly, constitutional. There was little or nothing of political philosophy in it. He merely tested the suspension of the privilege of the writ of *habeas corpus* by the various forms of constitutional argument used in his day. (Continued in next issue)



Lincoln Lore

August, 1975

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Number 1650

A Philadelphia Lawyer Defends the President (Cont.)

First, he addressed the language of the Constitution itself. Here, and here alone, Binney had to use "the broad constitutional and natural argument" rather than "the merely legal and artificial." The narrow legal argument would say that the clause in the Constitution does not say explicitly who can suspend, but "suspend" means by customary English usage—and it is from English law that ours derives—passing a law to countervail the writ which is instituted by law. Only Congress can make law, and thus Lincoln had no power to sus-

pend the writ. Binney argued that such reasoning did not apply in this case because there is a peculiar American science of politics stemming from the fact that the Constitution is superior to all political power and itself makes things legal which Congress, unlike the British Parliament, cannot make legal or illegal. "Suspending the *privilege* of the Writ," he argued, "is not an English law expression. It was first introduced into the Constitution of the United States." The true reading, therefore, was this:



From the Lincoln National Life Foundation

FIGURE 1. In this detail from a ghoulish anti-Lincoln cartoon, President Lincoln, Secretary of the Treasury Salmon P. Chase, and Secretary of the Navy Gideon Welles watch as Horace Greeley and Senator Charles Sumner lower a coffin labeled "CONSTITUTION" into a grave. Other coffins are labeled "FREE SPEECH & FREE PRESS," "HABEAS CORPUS," and "UNION." The cartoon is entitled "The Grave of the Union. Or Major Jack Downing's Dream, Drawn By Zeke." It was published in 1864 by Bromley and Company in New York City. The cartoons were available at 25¢ per copy, five for a dollar, fifty for nine dollars, and one hundred for sixteen dollars. Although the constitutional argument as outlined by Horace Binney, Roger B. Taney, and Attorney General Edward Bates was dry and complex, the issue of suspending the privilege of the writ was a popular issue exploited by the Democrats in cartoons and campaign literature.

The Constitution of the United States *authorizes* this [suspension of the privilege] to be done, under the conditions that there be rebellion or invasion at the time, and that the public safety requires it. The Constitution does not *authorize* any department of the government to *authorize* it. The Constitution itself authorizes it. By whom it is to be *done*, that is to say, by what department of the government this privilege is to be denied or deferred for a season under the conditions stated, the Constitution does not expressly say; and that is the question of the day.

To answer "the question of the day" was now easy. All Binney had to do was to determine which department of the government customarily exercised power over the sorts of questions mentioned in the *habeas corpus* clause. The executive is clearly the power which must cope with rebellion and invasion and declare when the public safety has been endangered by them. As a result of the Whiskey Rebellion of 1794 (Binney called it the Western Insurrection), a law of 1795 clearly enacted "that when the United States shall be invaded or be in imminent danger of invasion" and "whenever the laws of the United States shall be opposed, or the execution thereof be obstructed in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal by this Act, it shall be lawful for the President of the United States to call forth the militia of such State, or of any other State or States, *as may be necessary to suppress* such combinations, and to cause the laws to be duly executed." A Supreme Court decision, *Van Martin v. Mott* laid it down that the President's judgment was conclusive; he could decide the point at which there was rebellion. In fact, President Lincoln called forth the militia in 1861 by authority of that 1795 act.

The second and most important aspect of Binney's argument was its rejection of the applicability of British example by analogy. Sydney George Fisher wrote what remains the outstanding treatment of the subject of "The Suspension of Habeas Corpus During the War of the Rebellion" for the *Political Science Quarterly* as long ago as 1888, and his summary of Binney's case in this regard merits quotation at length:

It is true, he went on, that in England Parliament alone may suspend. But this English analogy is misleading. The American and English constitutions are very different. By the English constitution, Parliament, being omnipotent, may suspend the privilege of *habeas corpus* at any time, even in time of profound peace, and has in our own day suspended it during labor riots. The American constitution confines the suspension to rebellion or invasion. The unlimited power of suspension allowed in England would undoubtedly be dangerous in the hands of one man, but not so the qualified power of our constitution. Again, it must be observed that in England the privilege of *habeas corpus* is given, without qualification or exception, by an act of Parliament, and nothing but a subsequent act of Parliament can suspend or abridge it. But in America a single clause of the constitution recognizes the privilege and at the same time allows its suspension on certain occasions. The suspending clause in the American constitution stands in place of both the enabling and the suspending act of the English Parliament. In other words, America has a written constitution which cannot be changed by Congress, and England has an unwritten constitution which can be changed at the pleasure of Parliament. . . . Our *habeas corpus* clause is entirely un-English because it restrains the legislative power as well as all other power, and it is thoroughly American because it is conservative of personal freedom and also of the public safety in the day of danger.

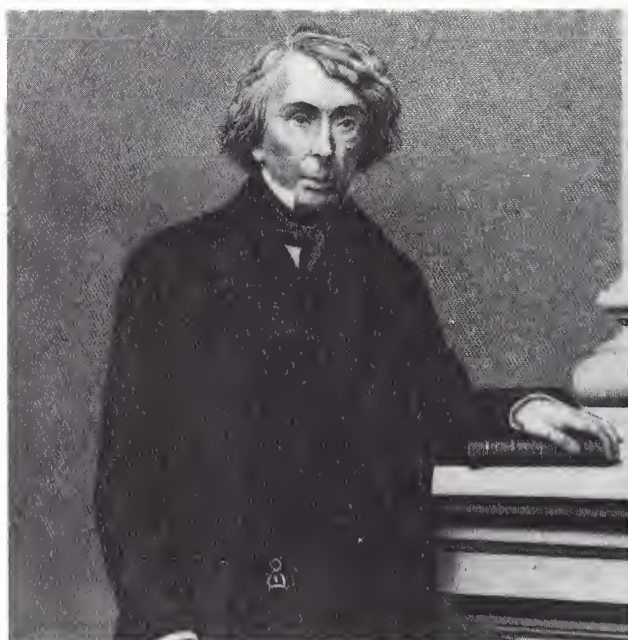
There is still another particular in which we must guard against analogy. The motive of the English people in putting the *habeas corpus* power entirely within the control of Parliament was their jealousy of the Crown. . . . But the framers of our constitution had no such fears of the President. The powers of his office had been substantially settled before the *habeas corpus* clause was proposed, and

there was nothing in those powers to excite alarm.

Having explicated the language in the Constitution itself and having disposed of the argument by analogy with English precedent, Binney then proceeded to examine the intent of the framers of the Constitution, insofar as there was evidence in their writings or in the records of the secret Constitutional Convention of 1787. Charles Pinckney of South Carolina originally contemplated a suspension by Congress only in times of invasion or rebellion. Later, he suggested suspension by Congress on vaguer grounds ("upon the most urgent and pressing occasions") and for a limited time period stated in the Constitution itself. Gouverneur Morris of New York suggested the final language a few days later. According to Binney, the convention rejected Pinckney's English view (suspension by the legislature when it deemed it necessary) for a uniquely American view. Originally, the clause was placed in the article pertaining to the judiciary, but the committee on style placed it in the first article because that section was restrictive throughout, not because most of the section places restraints on Congress.

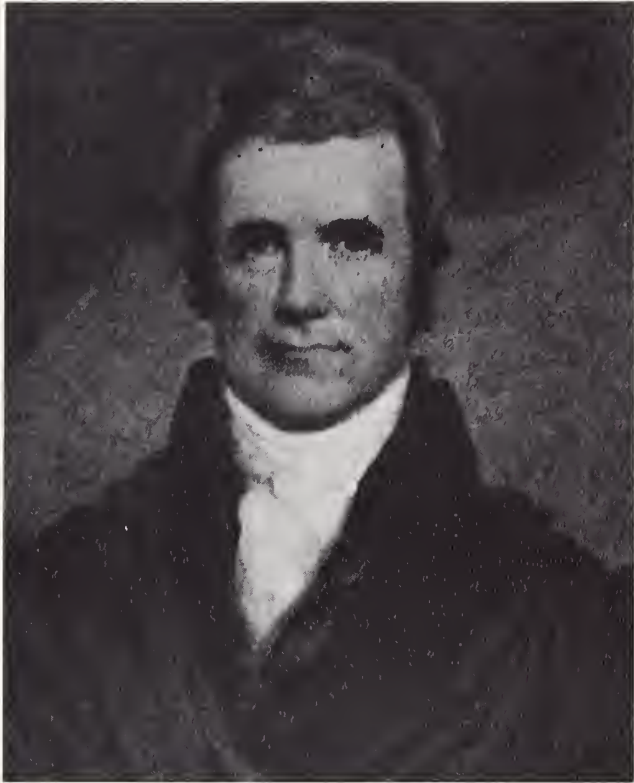
Binney then addressed the rather meagre judicial history of the clause. Taney's recent decision in the Merryman case had no authority because it did not come from the Supreme Court but from a circuit court. John Marshall's language in *Ex parte Bollman* had no bearing on the case, because there was no invasion or rebellion at the time, and neither President nor Congress had suspended. It was strictly an *obiter dictum*, not bearing on the nature of the case he had before him. Finally, Joseph Story's opinion was of little weight because it was the opinion of a *commentator* and not of a judge actually deciding a case or precedent.

Binney wrote before the era of the "sociological brief," and he did not address the question whether, in the abstract, it was better for the American people that Congress or the President have the power of suspension. He eschewed the argument from utility and confined himself to the customary lawyerly grounds for deciding a constitutional case: the language of the Constitution itself, the argument by analogy with English experience, the intent of the framers of the Constitution, the precedents in previous judicial decisions, and the opinions of learned commentators on the American Constitution. His argument was a dazzling courtroom-style performance, tightly woven on strictly constitutional and legal grounds. It astonished everybody, for, as Sydney George Fisher said



From the Lincoln National Life Foundation

FIGURE 2. Roger B. Taney



From the Lincoln National Life Foundation

FIGURE 3. John Marshall

twenty-seven years later, Americans "had supposed that the question was a settled one," and "up to the time of the rebellion it was the general opinion that Congress alone had the right to suspend." Though it prompted many outraged replies, Binney's argument also convinced a goodly number of authorities on the Constitution. Our view of Lincoln's construction of the powers of the Presidency would be much different today had this capable Philadelphia lawyer not taken time in his eighty-first year to defend the President.

3. Horace Binney and Slavery, an Epilogue

Charles Chauncey Binney carefully points out in his excellent *Life of Horace Binney* that the famed Philadelphia pamphleteer "by no means approved every act of the administration during the war, but he held that at such a time loyal men should refrain from all public criticism. He had his own opinions and he expressed them in private, but during the whole war no word fell from him which could have added the smallest feather's weight to the burden of those who were charged with the weighty task of government." By the autumn of 1862, Binney began to find fault, privately, with some of Lincoln's policies.

The first sign of misgiving came in an area one would deem surprising if one took Federalism to mean a form of undiluted conservatism. On August 5, 1862, almost two months before the issuance of the Preliminary Emancipation Proclamation, Binney wrote Francis Lieber a long letter about slavery, part of the contents of which follows:

I have been much struck by the pointed and decisive answer the North is now giving to the pretence of the ambitious bad men of the South, who have poisoned their country with the belief that the North meant to uproot the institution of slavery, and therefore that it was impossible to avoid making war against us. The absence of any such Northern feeling generally, or even to a dangerous extent, is now the cause of our most dangerous and weakening divisions. Even in the midst of a war which is entirely defensive, and in the presence of imminent danger, it is the great impediment to the use of even military power to weaken the

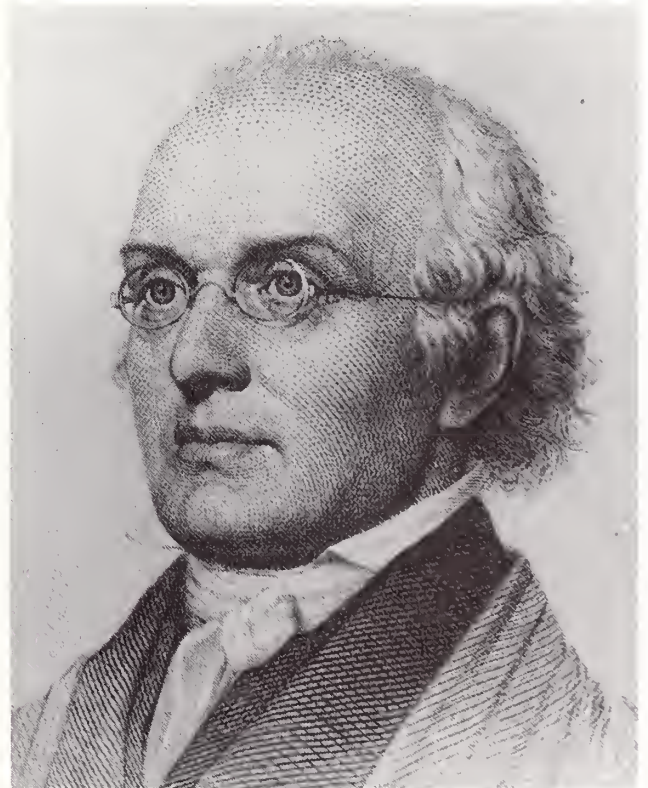
South by interfering in any way with their slaves.

God knows I disapprove of the institution of slavery every way,—for its effect upon the slaves, still more for its effect upon the masters, most of all for its incompatibility, growing and incurable incompatibility, with such a government, black slavery pre-eminently. . . . I do not wish to be quoted to the President, or any of the Departments, or to anybody; but while I am not and never have been an abolitionist, in the imputed sense, I have no idea of protecting the slaves of the South in such a war, or of letting them interfere with the full use of our military means, with them or against them, to subdue the enemy. Unless this result is reached and the slaves are made to be *adstricti* [confined] to their own States, I do not see how we are to live hereafter, either united or divided.

Thus this Philadelphia conservative arrived at the position which urged some form of tampering with slave property out of military necessity before President Lincoln felt he could touch the South's peculiar institution.

When Lincoln did attack slavery, Binney expressed his first note of dismay with the President's policies. Binney's reasons were ones of constitutionality, and, by and large, he thought the President should have gone farther. Thus he wrote J.C. Hamilton on October 8, 1862:

. . . the plans which have been adopted in the application in our immense force and resources I have sometimes disapproved when I thought I understood them, and much more frequently I have not understood them when our rulers have explained them. I go for the support of the government, as *per se* my duty, until mere obstruction shall be obviously better than what government is proposing to do; and that condition is not likely to occur. I say this in special reference to the President's Emancipation Proclamation, which is now the uppermost thing in the country. I do not understand the law of it. And do not believe there is any law for it, unless it be the law of force in war; and if it relies on that (which the Proclamation does not say, as I read it) it would, I think, have been much less disturbing to the country, and even more effectual, to have said it by way of conclusion



From the Dictionary of American Portraits, Dover Publications, Inc., 1967

FIGURE 4. Joseph Story

than of premises. . . . I still think the President is sincere and honest; but does the confidence of even his friends increase in his general competency?

In December, he wrote Lieber again. Binney had just read George Livermore's *Historical Research*, which the President was also reading or about to read (see *Lincoln Lore*, Number 1621). "I have travelled alongside of the muse of this history for more than sixty years," wrote Binney, "and all is written in my memory as Mr. Livermore records." He also asked Lieber what he thought of the President's recent Message to Congress. For his own part, he thought it

like his other messages, honest, sincere, and frank; and some of its *short* logic is good enough, but he does not excel, I think, in *long* logic, and I remain quite at a loss to reconcile his proclamation with his *projet* of emancipation, except by supposing that the emancipation shall apply only to those slave States which shall be represented in Congress on the 1st Jany., and to whom the proclamation seems to promise that they shall keep their slaves in slavery as they now are! I shall be glad, however, if he gets through the matter in any way, zigzag or otherwise. There is, I fear, no straight line of passage through it but force, if this people would consent to it.

By January of 1865, Binney had, despite his constant conservatism in the matter of democracy, moved along with the times (or rather ahead of them) sufficiently to write Lieber the following remarkable letter:

As to the universal suffrage of free blacks, my judgment is suspended. I have no repugnance to it. Fifty years ago, as a judge of election, I ruled that a free black native of Pennsylvania, who had paid his tax, was entitled to vote; and there was no dissent. Our Democrats, to accommodate the South, changed our [Pennsylvania] Constitution in 1838 (amended it, they said) by confining the elections to white freemen. But I have always questioned, and almost repudiated, the quietism of the Federal Constitution in turning over to the States the qualification for representatives in Congress.

Since 1903, Horace Binney has been remembered only for his pamphlet on the *habeas corpus*. Almost nothing exists in print on this remarkable man. To know him only by his pamphlet is to dismiss him as a facile conservative who was also an artful pleader of special causes. But we know today that the Federalist party, after the disappearance of which Binney never found a comfortable political home, comprehended an interesting variety of opinions. Some Federalists became politically adaptable in the declining years of their party; this was not, apparently, the case with Binney, who could never really get the hang of party politics. Some Federalists held attitudes towards slavery which were closely akin to those of later Republicans but were held back from any moral crusade by their being accustomed to an orderly hierarchical society which condemned political passion and individual self-assertion as the ultimate political sins. Binney was more at home with the America of 1861-1865 than of 1828-1856, and not merely because he could convert the Civil War to the cause of defending the authority of the national state, but because the times more nearly fit his moralistic vision of a political order. Parties were not gloried in in the 1860's, and slavery was clearly on the way out.

4. Conclusion

Binney receives honorable mention in several notable books. James G. Randall's *Constitutional Problems Under Lincoln* showed considerable respect for Binney's pamphlet. Without expressing a strong opinion as to its merits, Randall did fault Binney for his wish that the language of the Constitution had been more precise in regard to the *habeas corpus*. Writing in the age of "legal realism," Randall rather admired constitutional vagueness for the flexibility it allowed. In this respect, Randall's successor as a student of constitutional problems under Lincoln, Professor Harold Hyman of Rice University, is very much like his predecessor. Quoting a letter from Binney to Lieber with which one edition of *The Privilege of the Writ of Habeas Corpus under the Constitution*

was prefaced, Hyman notes with approval that Binney thought the question "a political rather than a legal question,—a mixed political and a legal question. . . . No one should be dogmatical, or very confident, in such a matter." Hyman sounds like Randall when he adds, "At least Binney's frank inconclusiveness hit closer to constitutional realities than Taney's negative certainty or Bates's responsive geometry."

In truth, Hyman's remark and Randall's point of view both fail to capture the spirit of Binney's enterprise. After reading an answer to his pamphlet written by Judge S.S. Nicholas of Kentucky, Binney complained to Lieber:

What is the use of logic? Would you believe that for all my pains I get an answer from Judge Nicholas, which amounts to this and no more: If Congress, without the Habeas Corpus clause had taken away or not given the Habeas Corpus, how could the judiciary have helped it? God save the poor man who wastes lamp-oil on such heads! He does not perceive that this reduces it to a question of force. If the President will imprison without law, how is Congress to help it? "What is the use of logic?" he said. Binney demolished Taney with constitutional logic, that is, with the traditional tools of the constitutional lawyer. For Binney, the life of the law was logic and not experience (to turn Holmes's famous saying on its head). He was vitally interested in what the Constitution actually said, whether American law was like English law, what the framers said, and what other judges said. Even the words of someone no farther removed than an accepted commentator (Story) were suspect. There was little or nothing of legal realism in this; this was a logic-chopper's work. He published no enthusiastic defense of the Emancipation Proclamation, probably for the reason that he could "not understand the law of it." Binney in no way challenged the accepted platitudes of mid-century constitutional jurisprudence. He was no less wedded to the separation of powers, say, than Edward Bates was; he simply located the ability to suspend the privilege of the writ of *habeas corpus* in that power which by long legal precedent could recognize a state of rebellion. If anything, his argument was a detriment to the advent of "legal realism," for Binney stressed a peculiarly American constitutionalism unlike that of Britain's ever-changing unwritten constitution and dashed Taney's analogy to English Parliamentary practice to pieces.

George Fredrickson's *Inner Civil War* seems off the mark as well in its casual dismissal of Binney as a reactionary old fogey. "For Binney," says Fredrickson, "as for [Wendell] Phillips, the time of the Alien and Sedition Acts had returned, but for Binney it was an occasion for rejoicing." Binney's argument was not, apparently, opportunistic. The President had other defenders, his Attorney General and Joel Parker, for example; Binney entered the fray simply because he thought their manner of defense was wrong. He wanted to make a correct constitutional point. Nor did he rejoice uncritically in the opportunity war afforded authoritarianism. He disliked Nicholas's argument because it reduced law to mere force, and, more importantly, as his biographer points out, Binney had his differences with the Executive. Some of these were on the score that Lincoln took too authoritarian ground.

. . . it should be noted [says Charles Chauncey Binney] that he strongly disapproved of so much of the President's proclamation of September 24, 1862, as extended martial law and suspension of the Habeas Corpus to military arrests for discouraging enlistments, or for other disloyal, but not legally treasonable, acts. This proclamation went far beyond anything that Mr. Binney's pamphlets had justified, but he refrained from any public expression of his views, as he thought it the duty of loyal citizens not to hamper the administration by protests, although it might make mistakes or even exceed its legal power.

President Lincoln was indeed fortunate in having Horace Binney as his unsolicited defender. Binney himself has not been as fortunate in finding students with a sympathetic understanding of his constitutional world.

Fehrenbacher Says Lincoln Considered Civil War Sequel To Revolution For Americans

"Coercion of government by a minority is incompatible with the principle of majority rule and thus ultimately with the preservation of individual freedom," said Don E. Fehrenbacher in an address on "Lincoln and the Paradoxes of Freedom" delivered last night at Gettysburg College as the first of a series of public lectures in the state's Bicentennial Forum for Democracy.

Fehrenbacher said that Lincoln acknowledged a disturbing paradox, "that any act of liberation may also be, for someone, an act of oppression. The emancipation of four million slaves was a confiscation of property on an enormous scale." For Southerners, "emancipation was but the 'crowning act of tyranny,'" for example.

Lincoln considered the war as a struggle for human freedom generally — "the last great test in the American experiment of popular government and thus a kind of sequel to the Revolution."

ATTACKS ON LINCOLN

Lincoln was accused, by both Southerners and Northern critics, of despotism because of the executive privileges he assumed during the emergency of war. The Democratic governor of New York, for instance, "publicly attributed to the Lincoln

administration the 'new and strange doctrine . . . that the loyal North lost their constitutional rights when the South rebelled, and all are now governed by a military dictatorship.'"

Lincoln was criticized by many for his "arbitrary arrests, military trials, and various other bold employments of executive power which contributed so much to the emergence of that astonishing modern phenomenon that Arthur M. Schlesinger has called 'the imperial presidency.'"

Lincoln "preserved the structure of American popular government but in the process impaired some of the substance of American liberty."

CITES EXAMPLES

Fehrenbacher said that Lincoln's ambiguity reflects the anomalous character of civil war. "The paramount purpose in any war is to defeat the enemy, but the first major task

(Continued On Page 2)

Fehrenbacher

(Continued From Page 1)

in a civil war is to distinguish enemies from friends." In the process "a certain amount of repression may be one of the unavoidable costs of victory."

He noted, as an example, that: "A Texas senator remained in his seat long after Texas had seceded, carrying on a program of military recruitment for the Confederacy from an office in Baltimore," and that "the Chief Justice of the United States, who detested the incoming Republican party and gave all of his sympathy to the Southern cause, nevertheless clung to the office until his death in 1864 — the highest-placed copperhead in the wartime Union government."

After the fall of Fort Sumter, Lincoln, "in a series of decisive actions, gave authoritative definition to a crisis that had not yet been defined. By these actions . . . he also defined the role that he expected to play in meeting the crisis."

HAD OBLIGATION

Fehrenbacher said that under the circumstances "it probably was unrealistic to insist, as Chief Justice Taney did . . . that the administration should rely upon the normal processes of government to deal with rioting, sabotage, and other echoes of rebellion north of the national capital."

Suspension of the writ of habeas corpus made it possible to throw thousands of persons into prison and keep them there for months at a time, often for reasons that would not have stood up in court, Fehrenbacher noted.

Lincoln "vigorously defended his course of action. He had sworn obligation to protect the Constitution of the United States, and that in turn meant preserving, by all necessary means, the government and nation for which the (Constitution) had been written as organic law."

CRITICS FEARFUL

Fehrenbacher said there are many definitions of freedom, some apparently contradictory. "Perhaps the primary distinction to be made is between freedom as a condition of an individual and freedom as the ruling principle of a society."

"For people who possess a considerable measure of freedom, the word is likely to have a more complex and extensive meaning," with the emphasis "tending to shift from avoidance of restraint to enjoyment of opportunity, from a state of personal independence to a process of self-realization." He noted that "individual liberties in the modern Western world are essentially the output of free society, and the prime input of such a society is power, properly conferred, organized and applied."

"One can therefore readily perceive that Lincoln and his libertarian critics were looking at freedom from opposite directions and in some degree talking past each other."

Lincoln's critics were fearful that the liberties he took with freedom in wartime might set a precedent for later chief executives. Lincoln's interpretation of the Constitution gave him the privilege of suspending the writ of habeas corpus "when in cases of rebellion or invasion the public safety may require it."

"Although Lincoln, in a general sense, proved to be right," Fehrenbacher said, "the history of the United States in the 20th century suggests that he brushed aside too lightly the problem of the example that he might be setting for future presidents."

Fehrenbacher suggested that "the limits of such emergency power, if it exists, must be determined by the nature of the emergency itself and are therefore undefinable in specific terms." The Founding Fathers set forth two circumstances in which the privilege of suspending the writ of habeas corpus might be assumed—rebellion and invasion. "Not war of any kind, it should be noted; not economic depression, or famine, or plague, or flood, or presidential election. Just rebellion and invasion," Fehrenbacher said.

Although Lincoln may have gone beyond necessity, he acted within the limited definition of national emergency and he considered his extraordinary authority as temporary.

"The modern imperial presidency was built to a considerable extent upon the concept of emergency power which Lincoln was the first to use on a significant scale, and this in spite of the fact that there has been no real instance of rebellion or invasion since 1865."

Fehrenbacher pointed out that Franklin Roosevelt in 1941 declared an "unlimited national emergency" more than six months before the attack on Pearl Harbor and that "at the hands of various 20th century presidents, the meaning of 'emergency' and 'national security' expanded greatly, and the use of the terms to explain extraordinary executive action became so frequent as to be almost routine."

"It is possible to conclude that Lincoln's judgment was eminently sound in the unique context of the Civil War, and yet not entirely fortunate as an example to be cited by other men acting in different circumstances."

1ST OF 20 LECTURES

Lincoln believed that few Southerners wanted to secede, but rather wished to bring pressure by secession to "extort concessions from the North and thus enhance Southern power within the Union. The critical issue, accordingly, was not whether a state possessed the constitutional right to secede, but how a constitutional majority should respond to the coercive action of a minority." The heart of the matter for Lincoln, however, was the threat that secession posed to democratic government and its core principle, majority rule.

"In other words, coercion of government by a minority is incompatible with the principle of majority rule and thus ultimately with the preservation of individual freedom."

Dr. Fehrenbacher's lecture was the first of 20 on the theme "Freedom: Then, Now, and Tomorrow" to be given throughout the state during the Bicentennial to provide Pennsylvanians with a chance to

examine the nature of freedom in American society. In addition to public lectures, more than 1,000 statewide Town Meetings, films, books and television programs are enabling Pennsylvanians to participate in observing the Bicentennial.

Dr. Norman A. Graebner is project director and introduced Dr. Fehrenbacher last night.



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Number 1694

The Confederacy As A Revolutionary Experience

by John David Smith

Lincoln doubtless faced overwhelming trials as President, but these pale in contrast to those confronted by his Southern rival, Jefferson Davis. Not only did Davis lead a revolution and establish a new nation, but he was called upon to fight a modern, total war, direct foreign policy, and maintain the spirit of Southerners for their cause. Regardless of whatever "natural" advantages the Confederates may have had — the revolutionary zeal of patriots for a new republic, the benefit of fighting a defensive war on native soil, the ability to draw on short interior lines of communication and supply — their opponents held the upper hand in those areas which really counted: men, materiel, industrial capacity, and organization.

What's more, Davis forged the Confederate nation from scratch. After secession he molded eleven sovereign state-republics, preindustrial in outlook and ever sensitive to their individual states' rights, into a confederacy, a federation with a surprisingly strong central government. Lincoln, on the other hand, inherited the reins of a country with years of experience in being a nation, and with all the administrative and industrial machinery to wage war. The early successes of the infant Confederacy were not lost on England's Chancellor of the Exchequer, William Gladstone. Speaking on the Confederacy at Newcastle in October, 1862, Gladstone's remarks were music to Davis's ears. In slightly more than a year and one-half, explained the Englishman, "Jefferson Davis and other leaders of the South have made an army; they are making, it appears, a navy; and they have made what is more than either, they have made a nation."

Although few historians have articulated it in these terms, the central theme of Confederate historiography is, and always has been, Confederate nationalism. Soon after Appomattox, architects of the myth of the "Lost Cause," men like Edward Pollard, Alexander Stephens, and Davis

himself, offered explanations, denunciations, and rationalizations for Confederate defeat. Despite their self-serving chauvinism and partisanship, these early writers raised salient questions about the nature of the Confederate experiment. States' rights, centralization, faulty leadership, economic backwardness, state socialism, foreign recognition, disaffection on the homefront — these and innumerable other elements of Confederate strength and weakness have attracted later generations of trained historians. Writing in 1925, for example, historian Frank Lawrence Owsley charged that the Confederacy died from an overdose of states' rights theory. In reality, though, Owsley and numerous other students of the subject have all along been probing the Confederacy as a national experience.

In his new volume on the Confederacy, *The Confederate Nation, 1861-1865* (New York: Harper & Row, 1979 [*The New American Nation Series*]), Emory M. Thomas focuses squarely on Confederate nationhood. Thomas, a historian at the University of Georgia, is no neophyte to Confederate historiography. His first book, *The Confederate State of Richmond* (1971), is a pioneer work in Confederate urban history, a biography of the South's capital as an embattled city-state. In addition to numerous articles and a textbook on the Civil War, Thomas established his credentials as a historian of the Confederacy in 1971 with the publication of *The Confederacy as a Revolutionary Experience*. This provocative speculative essay argues that the Southland underwent a dual revolution in its transformation from the Old South to the Confederate South. On one level the Confederacy symbolized an external "revolt against Yankee ways and a Yankee Union." But the revolution got out of hand and surpassed the goals of even the most rabid Southern revolutionaries. It ushered in an internal revolution, one which altered substantially the warp and woof of Southern life.



From the Louis A. Warren
Lincoln Library and Museum

FIGURE 1. The Great Seal of the Confederate States of America. In their political rhetoric Confederate Southerners honored the Founding Fathers. They perceived themselves as heirs to the revolutionary tradition of Washington and Jefferson. Confederates stressed their devotion to the true principles of American democracy, principles, they argued, which had been distorted under Northern misrule. The Confederate seal was designed by Secretary of State Judah P. Benjamin and was adopted by the Confederate Congress in May, 1863. Significantly, it showed an equestrian portrait of George Washington (after the statue of Washington which surmounts the Capitol Square at Richmond), surrounded by a wreath of the South's agricultural staples — cotton, tobacco, sugar cane, corn, and wheat.

Thomas's latest book draws upon the concept of a dual revolution to explain Confederate nationalism from secession in 1860 and 1861 to submission in 1865. Like many historians of the South before him, Thomas emphasizes Southern distinctiveness, individualism, localism, and conservatism. He interprets secession as a means for Southerners "to define themselves as a people and to act out a national identity." "The essential fact of the Confederate experience," writes Thomas, "was that a sufficient number of white Southern Americans felt more Southern than American or, perhaps more accurately, that they were orthodox Americans and Northerners were apostates. Southern sectionalism became Southern nationalism and underwent trial by war."

One of the great ironies of Southern history is that secession—the region's external revolution—was essentially a conservative act. Southerners severed the Union and precipitated civil war in order to preserve and protect unique Southern institutions from encroachment. Although such root-and-branch radicals as Edmund Ruffin, Robert Barnwell Rhett, and William Lowndes Yancey had fueled the impulse for secession, the fire-eaters lost control of the Montgomery Convention and became mere "ornaments in the Confederate body politic." In their stead emerged moderate tacticians, men like Jefferson Davis and Alexander Stephens. These "sensible secessionists" envisioned themselves as nineteenth-century heirs to the revolutionary tradition of America's Founding Fathers.

The Confederacy's first heroes were George Washington and Thomas Jefferson. Both men were good Southerners, but better yet, great Americans. Confederate Southerners wished not to repudiate their historic ties with the American experience. Rather, they celebrated the American past and decided only reluctantly to leave the Union. Dragging forth Washington and Jefferson as models, Confederate leaders believed that they too were justified in dissolving a Lockean compact by force.

Implicit in Thomas's analysis of the Confederate revolution are themes examined first by historian Bernard Bailyn in his authoritative research into the ideological origins of the American Revolution. Just as the revolutionaries of 1776 claimed that George III's colonial policies had perverted the spirit of the English constitution, the Confederate revolutionaries of 1861 charged that Northerners were destroying the principles of American representative government. The Confederates revolted *not* because of any dislike for the American Constitution, but because they held it so dear and detested the manner in which it was being distorted under Northern leadership. Significantly, in spite of their numerous allusions to the Founding Fathers, the Confederates never proposed America's only real precedent for confederation, the Articles of Confederation.

The Confederate Constitution illustrates well the essential conservatism of the South's external revolution. Whereas radical states' rightists favored a constitution designed to extend and intensify the slaveholders' ideology, "safe," moderate voices prevailed. The resulting document, the Confederate Constitution, was less Southern than American in origin. In most respects it resembled the very Federal Constitution which the secessionists had allegedly repudiated. Curiously, for example, the founding fathers of the new planters' republic refused to provide for the re-opening of the African slave trade. Thomas sees their conservatism as the Confederates' foremost characteristic. After secession, he writes, the "Confederates did not believe they needed to make new worlds; they were more than content with the world they already had." Their fundamental goal was not a break with the past, but rather the preservation of the Southern status quo.

War, however, altered drastically the entire nature of the Confederate experiment. After the attack upon Fort Sumter, Southern leaders no longer could speak in idealistic terms of a peaceful separation from the Union or of the Confederacy as simply an alternative nationality. War placed such strains on the fabric of the Confederacy that it occasioned the radical, internal revolt which ultimately rocked the Southern ship of state from its moorings.

The seeds of the internal Confederate revolution lay first in the outbreak of war, and second in the Confederate Constitution itself. The preamble to that document spoke both of the Confederate States acting in their "sovereign and independent character," and of a "permanent federal government." Delegates to the Confederate Constitutional Convention in Montgomery were not unaware of the potential dilemma

posed by a clash of state and Confederate rights. But rather than confront the problem, they "were satisfied to affirm state sovereignty in general terms and trust future generations to understand the meaning of the phrase." War, however, made the future the present. Designed to function during peacetime, the loose confederation of Southern states faltered terribly after the Confederacy's initial victory at Manassas.

Better than any previous historian, Thomas places the string of Confederate military setbacks and bungled campaigns, July, 1861-April, 1862, into the context of Confederate nationalism. During the early months of 1862 the Confederacy was clearly foundering as a result of its commitment to states' rights. "Southerners," writes Thomas, "had tried to act like a nation and had failed." During the first year of its existence as a nation, the Confederacy "had been an incarnation of the Old South, and as such the Old South had been tried and found wanting. Southerners found that Confederate national survival and rigid adherence to ante-bellum Southern ideology were mutually exclusive. The ante-bellum South could not metamorphose into the 'bellum' South without some fundamental alterations in its cherished way of life."

Thomas credits Jefferson Davis's positive and creative leadership with holding the key to Confederate survival for three additional years. With the support of the Confederate Congress, the President initiated a series of novel steps which transformed Davis's nation from a land steeped in the traditions of the Old South, to a revolutionary Confederate South, "distinct from the Souths that came before and after." During this second phase of the Southern revolt, the locus of Confederate power was in Richmond, no longer in eleven provincial state houses. The war against the Yankee invaders was conducted on a national level with strong centralized leadership provided by the President. Centralization, a sharp move away from states' rights and the ethos of the individual, became the Confederate way of life after 1862. Not only did the Davis regime come to control the South's military-agricultural-industrial complex, but it taxed, impressed supplies and laborers, and regulated foreign trade. Davis and the Confederate government even resorted to such infringements of personal liberties as the suspension of the writ of *habeas corpus*, the power to declare martial law, and conscription. In 1865, as a last ditch effort to provide men for the South's decimated armies, Congress authorized the arming of blacks as soldiers. Their willingness to sacrifice slavery—the South's sacred cow and cornerstone of the region's socio-economic system—revealed just how far Confederate nationalism had changed in the course of the war. Davis's all-consuming quest for Southern independence, Confederate self-determination, led the President to repudiate many of the principles upon which his new nation had been founded. Equally important, the Confederacy's internal revolt forced changes in almost every aspect of Southern national life.

One of the most dramatic areas of social change within the Confederacy was the impact of the war on the master-slave relationship. Thomas draws heavily on Eugene D. Genovese's view of slavery as a seigniorial institution. It was a system of interdependency whereby the slaveholder depended upon the bondsman for labor and deference, and the slave upon his owner for paternal mastery and support. This reciprocal relationship may or may not have been stable during peacetime, but it unquestionably experienced severe strains during the Confederate war. Several forces worked to weaken the bonds between master and slave and, in turn, undermined the peculiar institution.

First, many masters served in the Confederate Army and their absence led to an overall decrease in white hegemony on the South's farms and plantations. "Substitute masters"—planters' wives, the elderly, overseers, and children—failed to provide the slaves with paternal control and, consequently, commanded less obedience from the slaves. Wartime shortages, the impressment of slaves, the presence of Union armies in rural districts, and the dramatic increase in the number of slaves in Southern cities also upset the traditional role of the master.

The exceptional circumstances of war prevented the planter from assuming the role of provider and master of all situations. As masters acted less like masters, slaves acted less like slaves. Thomas presents excellent case studies of the subtle and complex ways in which slavery changed under the pressures of war. Throughout the South, bondsmen began to break their chains either by running away or by less overt

means such as disrespectful or impudent behavior. Incredulous planters suffered considerable pain as they watched helplessly their social system, and their world, crumble about them. On the question of slave resistance, Thomas is extremely careful not to distort his evidence. Slaves, in fact *did* fight against the Confederacy by assisting runaways and Union troops. In doing so they were working out their own liberation. On the other hand, though, the slaves never rose *en masse* against their captors. Some even exhibited paternalism, guarded their masters, and thus reversed the master-slave roles.

Thomas's analysis of black Confederates is but one of numerous strengths in his excellent book. The volume is exhaustively researched and gracefully written. Its conclusions are in the main carefully reasoned. The footnotes bristle with references to the latest Confederate scholarship and the book's fifty-page bibliography is the most comprehensive enumeration of Confederate historiography in print. Only one recent major work, James L. Roark's *Masters Without Slaves* (New York, 1977), is omitted.

Thomas surveys all phases of the Confederate experience — administrative, cultural, diplomatic, and military — in such a judicious manner that none seems disproportionate in emphasis. This is especially true of his superb military accounts which are analytical and insightful, not mere rehashes of well-known Civil War engagements.

Perhaps Thomas's greatest strength as a historian is his uncanny ability to penetrate below the surface of complex issues and render balanced judgments. When analyzing the Confederacy's offensive-defensive strategy, for example, he makes the important point that the measure of Confederate nationhood was not achieving military victory, but rather avoiding defeat. Endurance was the key to Confederate nationalism. Every day the Confederate government survived offered undeniable proof of Southern independence and the success of Davis's conservative revolt.

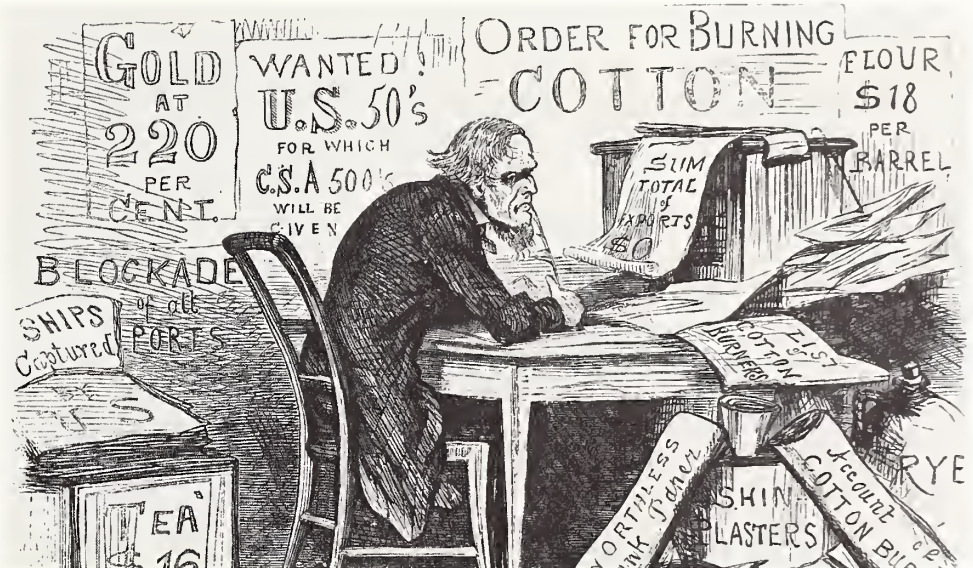
He also offers just appraisals of two of the Confederacy's most maligned figures: Treasury Secretary Christopher G. Memminger and Davis himself. Both men were criticized in their day by disgruntled Confederate editors and politicians. Through the years historians have heaped much of the blame for Southern defeat on their shoulders. Thomas, however, is sympathetic in his treatment of them. Memminger, he argues, was a victim of Confederate circumstance. Although the South Carolinian favored a system of direct taxation from the start, his wishes were stymied by the overwhelming financial needs of the new nation and the innate conservatism of states' rights ideology. Cognizant of "the folly of unsupported paper money," Memminger tried repeatedly to retire large quantities of Southern paper currency and thereby arrest inflation. The task, concludes Thomas, simply was too great.

His positive assessment of Davis is in line with the recent biography of the man by Clement Eaton and with Paul D. Escott's important new book, *After Secession: Jefferson Davis and the Failure of Confederate Nationalism* (Baton Rouge: Louisiana State University Press, 1978). The new scholarship on Davis, while not eulogizing him as Hudson Strode did in his multi-volume biography, emphasizes the President's dedication, intelligence, and considerable flexibility. Although in many ways Davis remains a sphinx, historians no longer view him totally as an icy, snappish, doctrinaire constitutionalist.

What impresses Thomas most about Davis was the Mississippian's unflagging commitment to Confederate self-determination. Yet by February, 1865, when the Confederate Congress expressed its lack of confidence in his leadership,

the cause was already lost. "Davis," explains Thomas, "had tried to unify military command in himself, and although he had done so to a greater degree than his enemies, the Southern President had failed as a war leader, if only because he was losing the war." Even after Richmond had fallen, however, Davis refused to succumb to defeat and was ready to take to the hills to lead a guerilla war. The author notes that Davis's plan to fight till the end "reversed the normal pattern of guerilla operations and envisioned a transition from regular forces to partisans instead of the other way around." But an unconventional, irregular war proved unacceptable to a people who had already given so much of themselves in four years of strife. Southerners, concludes Thomas, were unprepared to offer "the ultimate sacrifice: that of themselves and their fundamental attachment to people and place."

Thomas undoubtedly is correct. There were limits to the lengths Southerners would go to win independence. But he merely speculates when he argues that the Confederates held a greater attachment to hearth and kin than did the Yankees. There simply is no way to prove or disprove an assertion such as this: "Confederates were conditioned to look upon land as the basis of wealth and social status. The culture of the Southern folk required a stable community of landholders." Could not the same sentences be applied to Northerners? Antebellum Northerners and Southerners worshiped land. In



From the Louis A. Warren
Lincoln Library and Museum

FIGURE 2. In his new book Emory M. Thomas sympathizes with the impossible fiscal problems faced by Confederate Treasury Secretaries Christopher G. Memminger and George Trenholm. This anti-Confederate cartoon appeared in *Harper's Weekly*, September 6, 1862, p. 576. It is clearly unsympathetic to Jefferson Davis's economic woes.

this respect, at least, the Southerner was an American, not a Southerner *sui generis*.

Thomas's thesis stems from David M. Potter's interpretation of Southern distinctiveness which appeared in the *Yale Review* almost twenty years ago. In "The Enigma of the South," Potter wrote that the South's "culture of the folk" was the region's most identifiable trait. According to Potter, historically "the relation between the land and the people remained more direct and more primal in the South than in other parts of the country." Potter, one of the most careful and distinguished historians of the South, advanced this thesis as one possible answer to a vexing enigma, not as dogma. Thomas, however, applies Potter's tentative explanation of Southernism uncritically and weds it to his own interpretation of Southern individualism.

Thomas's emphasis upon the individualism of Southerners and their unique characteristics leads him to make some provocative, though not completely defensible, arguments. Not only is this true of his treatment of the Confederacy's cultural and intellectual history, but of its military and economic history as well. The author's description of Pickett's assault on the Union center at Gettysburg is a good case in point. According to Thomas, the charge was "a gallant disaster. In a way it was the entire Confederate war in microcosm — a

gathering of clans instead of military organizations[,] led by an officer corps distinguished by its eccentricities, marching forth with bands playing and flags flying to take a gamble justified largely by the size of the stakes." Aside from the fact that Thomas fails to develop the ideas implicit in the terms "clans" and "eccentricities," might not similar words be used to describe the actions of Burnside and his Union troops at the Battle of Fredericksburg?

In another instance, an interesting analysis of the Confederacy's industrialists, Thomas espouses the distinctiveness of the South's captains of industry. Employing Antonio Gramsci's distinctions between types of intellectuals, Thomas argues that the leaders of the South's war industries "were hardly entrepreneurs whose acquisitive instincts fit the Yankee stereotype. On the contrary, the South's war industrialists tended to be 'traditional intellectuals' — school teachers, natural philosophers, and military scientists — as opposed to 'organic intellectuals' — industrial managers, mechanical engineers, and the like." His point would be far more convincing had Thomas examined the antebellum backgrounds of a large number of Confederate industrialists. Instead, he analyzed the postbellum careers of but five figures, too small a sample from which to draw overall conclusions. A real test of Thomas's hypothesis would have been the sort of collective biographical research conducted recently by Maury Klein into Northern Civil War industrialists.

Thomas's treatment of Confederate economic history raises additional questions as well. First, throughout his volume the author equates "preindustrial" with "precapitalist." Eugene



From the Louis A. Warren
Lincoln Library and Museum

FIGURE 3. In the waning days of the Civil War some Confederates proposed granting dictatorial powers to General Robert E. Lee. One of the South's most beloved figures, Lee joined the Confederate Army reluctantly, only after his native state, Virginia, had seceded.



From the Louis A. Warren
Lincoln Library and Museum

FIGURE 4. A Mississippi planter, Jefferson Davis surrounded himself with fellow members of the Southern elite. In the process he alienated the South's plain folk.

D. Genovese's important scholarship notwithstanding, cannot a region such as the Old South be simultaneously agricultural and still capitalist? Given Thomas's use of these terms, the Old North — largely agricultural but more industrialized than the Old South — would be precapitalist too. Part of Thomas's problem is that Confederate agriculture (the same may be said for Confederate religion) has not received the careful attention from scholars which it deserves. Students, for example, must test his conclusion that "The Confederates sustained themselves industrially better than they did agriculturally and far better than they had any reason to expect in 1861." Much more also needs to be learned about the economic condition of the Southern masses during the war. Although Thomas does not neglect consideration of the ordinary Confederates, the nonslaveholding yeomen and urban dwellers, our knowledge of this majority of Southerners is thin. Paul D. Escott's new book is a major step in the right direction. According to Escott, President Davis's greatest blunder was his insensitivity to the economic problems of the South's plain folk. Limited by his states' rights critics and his upper class perspective, the Confederate chief executive proved unable "to create the internal unity and spirit essential for the growth of Confederate nationalism."

Despite these strictures, Thomas has produced the best book on the Confederacy to appear in years. This is no mean feat because such outstanding Southern historians as E. Merton Coulter, Clement Eaton, Charles P. Roland, and Frank E. Vandiver have contributed valuable monographs on the subject. Thomas brings a mastery of the sources and a keen analytical mind to the task. He has established himself as the foremost interpreter of the Confederacy, the South's national experience.

Lincoln's Nonviolation

To the Editor:

"As Laws Are Flouted, [by Presidents and their administrations] Congress Seethes" (Washington Talk, Nov. 13) cites Abraham Lincoln as an example of "flouting" when he suspended the writ of habeas corpus.

Lincoln and his Administration may have been guilty of some law "violations," e.g., using money to purchase arms abroad without Congressional appropriation. However, suspension of the writ of habeas corpus was not one of them, as the Constitution *does* permit such suspension "in cases of rebellion." What the Constitution does not say is who has the power — Congress, the President, or both.

FRANK J. WILLIAMS
Boston, Nov. 22, 1985

The writer is president of The Lincoln Group of Boston.

To:

date:

From: Harold Holzer

Lincoln's Constitution

To the Editor:

William S. McFeely's review of William Safire's "Freedom" (Aug. 23), referring to Lincoln's suspension of *habeas corpus*, says, "If the Constitution needs bending, he will bend it." The statement involves a misconception. No bending was required. The Constitution contains no absolutes, except, perhaps, on



FROM "FREEDOM"
Abraham Lincoln in 1862.

points of little significance, and Lincoln's was a rightful exercise of necessary Government power.

This is hardly critical of Mr. McFeely; the misconception amounts to consensus. Hugo Black, one of the most admired Justices of the Supreme Court, shared it. But every important provision of the Constitution is subject to exceptions, no matter how stern the language. For example, the provision currently most prominent, the free expression, guarantee of the First Amendment: the press may not publish the sailing dates of troop ships; conversation may not include inside corporate information. It is easy to multiply

instances.

When the situation is perilous enough, rights usually unassailable must yield. The Constitution is an instrument of Government, not holy writ. It was designed to establish and preserve a political structure and, as the document says, to promote the general welfare of the society it shelters. At this moment, there is dangerous reliance on the misconception in the assertion of an absolute right of privacy, said to bar measures needed to meet the plague of AIDS.

CHARLES REMBAR
New York

Times Book Review

Son.

9/13/87



"USA TODAY hopes to serve as a forum for better understanding and unity to help make the USA truly one nation."
—Allen H. Neuharth
Founder
Sept. 15, 1982

Peter S. Pritchard
Editor
Cathleen Black
Publisher

John Seigenthaler
Editorial Director
Thomas Curley
President

DEBATE

Don't let liberties be a war casualty

War in the Persian Gulf puts the lives of our soldiers at stake and makes citizens at home vulnerable to terrorism. In time of war life is not normal. Neither are the precautions needed to protect soldiers and citizens.

But precautions must not become abuses, as they have in the past when individual liberties were battle casualties.

This weekend's demonstrations for and against the war could tempt officials to cross the line between necessary precautions and abuse of individual liberties.

Threats and harassment of both Arab-Americans and Jews remind us that individuals can cross that line, also.

Other developments that may not pose a threat now but bear watching.

► Government clampdowns on news from the battlefield to protect strategic secrecy and troop safety. Much of the information about the war the U.S. public now gets is government-issued.

► Arab-American leaders complained that the FBI unfairly targeted them for questioning about terrorism when they're really the targets of terrorism.

► Immigration and Naturalization Service fingerprinting and photographing those entering the country with an Iraqi or Kuwaiti passport. And searching the luggage of those fitting certain profiles.

You can read elsewhere on this page that these are just precautions and no cause for concern.

But we should be alert.

Fear runs high in war time, and fear has been the government's best excuse for some terrible abuses.

During World War II, fears that Japanese-Americans would find their loyalties strained led to the unconscionable internment of tens of thousands of U.S. citizens.

At the beginning of the Cold War, fears of communism led to the inexcusable outrages by Sen. Joseph McCarthy — trumped-up charges of communist sympathies and extorted Senate testimony that devastated careers and ruined lives.

During the Vietnam War, fears about dwindling public support led to some unjust prosecution of anti-war protesters and the amassing of FBI files on those who were simply exercising their right to free speech.

Even in the absence of war, fear can fuel excesses. From 1963 to 1965 the FBI investigated opponents of President Reagan's Central American policy — including such "subversive" groups as the Women's Rape Crisis Center in Norfolk, Va., and the Maryknoll Sisters of Chicago.

The federal government is not alone in going too far.

An ugly mixture of fear and bias sometimes leads to the worst violations of individual rights by individuals.

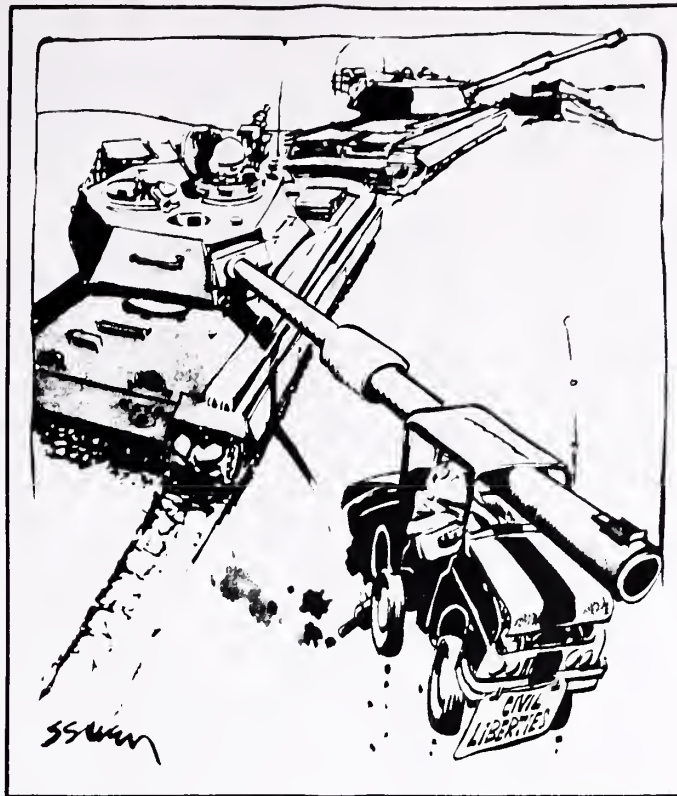
They are the ones who are hurling obscenities at Arab-Americans in Detroit.

They're the ones phoning threats to the Jewish Federation of Seattle, Wash.

We must take precautions to protect our troops and operations in the Gulf and to protect Americans from terrorism.

But as this war goes on, the distinction between necessary precautions and abuses must not be blurred.

In fighting for Kuwait's liberty, we have to take great care not to surrender our own.



By David Seevey USA TODAY

BRUCE FEIN

An opposing view

Civil liberties are safer than ever

GREAT FALLS, Va. — Civil liberties are less threatened now than at any time in our history.

Concededly, the record during the Civil War and both world wars exhibited many shortcomings. War, however, does justify practices otherwise unacceptable in order to maintain sovereignty and the survival of civil liberties thereafter. As Abraham Lincoln asked in 1861, "Is there, in all republics, this inherent and fatal weakness? Must a government of necessity be too strong for the liberties of its own people, or too weak to maintain its own existence?"

Learning from past mistakes, the USA shields civil liberties during emergencies with an impenetrable legal fortress. Those who accuse the FBI of invidiously and unconstitutionally targeting Arab-Americans are unperceptive.

No Arab-American is required to answer or cooperate. Further, the inquiries are in part to forestall crimes against Arab-Americans by anti-Arab hate groups. And seeking to assemble information regarding potential terrorist crimes by Iraqi fanatics is legally irreproachable. So is the FBI means to that end, no Arab-American is disadvantaged for choosing to remain aloof.

Would it make sense to ask U.S. Hindus if they could shed light on terrorist plans of Abu Nidal?

Worries over unconstitutional press censorship are also imaginary. The Supreme Court ac-



Bruce Fein, a lawyer, writes for Legal Times and The Washington Times.

knowledgeed in 1931 that the First Amendment is unoffended by suppression of militarily sensitive information. Yet the Defense Department has foregone any censorship. Under Pentagon rules, reporters must submit stories to public affairs officers on the scene, "to determine if they contain sensitive information that would jeopardize the outcome of an operation or the safety of U.S. or coalition forces." In cases of dispute, a reporter may obtain further DoD review, but the ultimate decision to publish remains with the reporter's news organization.

That power to publish without restriction in time of military conflict is unprecedented. It is especially astonishing coming within memory of the North Vietnam's 1968 Tet offensive, wildly misportrayed as a stunning success, in truth, it was a calamitous defeat for the communists.

The stupendous success of the Constitution is largely attributable to its measured balance of national security and civil liberties interests. We are in no danger of losing that balance.

JOHN LOFTON

An opposing view

Don't let war be lost because of 'liberties'

LAUREL, Md. — No one can deny, because it's true, that wars inevitably increase the size and power of the state. Thus, civil liberties can be endangered.

But some of the things being worried about strike me as fears that, in the real world, are unfounded. I mean, let's face it: when we're in a war we cannot conduct business as usual. No way.

So the FBI is keeping a close eye on some Arab-American individuals and organizations. So what? This makes good sense because we are at war with some Arabs. Indeed, if some of these folks were not being watched, the FBI wouldn't be doing its job.

Could such surveillance be abused? Of course. But then to even have an FBI to run the risk that it might do something illegal. However, we must have an FBI — and we need the bureau doing what it's doing, particularly in time of war, especially in a war where there are, alas, good reasons to expect that there might be terrorism within our own borders.

Now, the press. Our press, in reporting the war in the Middle East, should be severely restricted. In fact, to the extent it can be prevented, no members of the press should be allowed in any combat areas until after the fighting is over.

The Pentagon is wrong. Panama and Grenada, and World War II, were not mistakes. The stringent censorship imposed during these wars was absolutely correct.

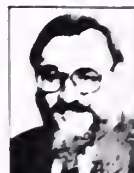
Even before war broke out in the Middle East, some in the press corps in Saudi Arabia were engaging in "reporting" that was outrageous. I saw CBS' Dan Rather badgering our troops about their morale and asking the ridiculous question: How did they feel about having to spend Thanksgiving and Christmas in the desert?

In other TV network reports I saw some reporters revealing that some Christian troops, despite Saudi prohibitions, were continuing to practice their Christian religion. I saw ABC's Good Morning America host Charlie Gibson, in Saudi Arabia, asking about and, incredibly, being told, where, specifically, some of our troops were getting their crucial water supplies.

And in one unbelievably idiotic report, also on ABC, I saw one correspondent do a piece about how our troops were disrupting the nomadic way of life in the desert by, accidentally, killing and wounding some camels!

This sort of "reporting" ought not to be allowed. It serves no useful purpose and can only hinder the war effort. And the only way to stop it is to censor it and this means censoring the press.

Civil liberties may yet be endangered and violated in this war. But, so far, this is not happening.



John Lofton, a former newspaper editor, is a freelance writer.

QUOTELINES

"[The FBI has] no ulterior motives in conducting interviews [of Arab-Americans]. We're doing this for the benefit of all the individuals of the U.S."

— Tom Jones, FBI spokesman

"The FBI wants to create the sense that there's an identity between Arab-Americans and a terrorist threat."

— James Zogby, Arab American Institute, Washington, D.C.

"If you had a neighbor that you knew was from the Middle East, you'd probably call the police."

— Col. Tommy Goodwin, Arkansas State Police, which has been questioning Arabs at request of federal agencies

"Civil liberties are among the first casualties of war."

— Ira Glasser, American Civil Liberties Union

"You are responsible for the bombing and I hope you get bombed too."

— Phone threat to Jewish Foundation in Seattle, Wash.

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VOICES/Does war justify restrictions on civil liberties?



William Taff Brown, 49
School principal
Tacoma, Wash.



Diane Bothe, 35
Business owner
Green Bay, Wis.



Joe Vitensi, 65
Former mayor
Paducah, Ky.



Sylvia Hargrave, 59
Production specialist
Madison, Ala.



Jennifer King, 18
Student
Saratoga Springs, N.Y.



David Pond, 47
Contractor
Cincinnati, Ohio

During times of war there should be limited restrictions, simply because there are some incidences of terrorism in the country. I think it's OK for the FBI to ask Arab-Americans questions, as long as they're not bombarded. But the press should be allowed to let the public know what's going on.

No. Civil liberties should always be kept in focus. You would think we would have learned from Pearl Harbor when we unjustly accused Japanese-Americans. I don't think we should start doing that now with Arab-Americans. We let them become citizens and trusted their judgment. We should do that now.

I think there should be restrictions on civil liberties. I've watched the war reports almost every day on TV, and I've got some reservations about the media. I don't like the kind of questions they ask. And Arabs who are not citizens should be closely watched because you've got to find out what their purpose is.

War doesn't give people the right to violate the civil liberties of others. But some people will use that as an excuse to say foreigners don't belong here. I have a son-in-law who's from Egypt, and so far, he hasn't run into any problems. God made us all human and regardless of race, we're all God's people.

You have to be careful at times like this, but not to the point where you're going to be offending people. This is supposed to be a free country, and you don't want to treat people like criminals. I don't think the press should be as specific in their reports, such as telling where the bombs are landing.

I don't think war is an excuse to restrict civil liberties. But we do have to be careful. Saddam Hussein has a history of carrying out threats. The people who are in the country on visas and getting an education are the ones who should be investigated, and not the ones who have lived here all of their lives.

Letters

Since Lincoln, Wartime Rights Erode

To the Editor:

The Supreme Court has frequently had to rule on democracy in wartime, Tom Wicker's subject in "Lincoln and the Gulf" (column, Feb. 13).

In the Civil War, Lincoln's decision to suspend the writ of habeas corpus was found to exceed his constitutional powers. The Court, freeing Lambdin Milligan from his military captors, declared: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

In World War I, Congress passed the Espionage Act, which criminalized subversive advocacy. In sustaining conspiracy convictions, Justice Oliver Wendell Holmes spoke for a unanimous Court enunciating the "clear and present danger" test: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

In World War II, the Supreme Court sustained a conviction for violating a military order excluding people of Japanese ancestry from designated West Coast areas. The Equal Protection Clause notwithstanding, the Court reasoned: "Hardships are part of war, and war is an aggregation of hardships."

In the Vietnam War, David O'Brien burned his draft card as a symbolic expression. Chief Justice Earl Warren dismissed the claim that this antiwar message was constitutionally protected speech.



Elliott Banfield

The 1866 Milligan warning proved prophetic: Should "the calamities of war again befall us, the dangers to human liberty are frightful to contemplate."

ROGER BRANDWEIN
New York, Feb. 14, 1991

Not Like Bismarck

To the Editor:

In "Lincoln: Was He America's Bismarck?" (Op-Ed, Feb. 12) Carl N. Degler misses the mark. Bismarck's role more closely resembled that of Jefferson Davis than it did that of Lincoln. The Battle of Königgrätz, in which Bismarck's Prussia defeated Austria in 1866, amounted to a German Gettysburg — and the secessionists won.

H. A. TURNER
Chas. Seymour Professor of History
Davenport College, Yale
New Haven, Feb. 13, 1991

To the Editor:

Barry Latzer (letter, March 27) still has his habeas corpus statistics wrong. The study he cites made a mistake that annuls its finding of a 17 percent success rate for habeas corpus petitions in capital cases.

In an Aug. 9, 1994, letter to judges and prosecutors, the author of the study, Victor E. Flango, admitted "that the sample of habeas corpus petitions used in our research is limited because it does not present a complete picture of what happened to habeas petitions once they left the U.S. District Court." The only way to get the right answer, Dr. Flango wrote, was to study "all [capital] habeas petitions in all courts."

I have conducted that study. It shows a 40 percent success rate in all capital cases from 1978 to 1995.

JAMES S. LIEBMAN

New York, March 27, 1996

The writer is a professor of law at Columbia University School of Law.

Grave Trouble for the Great Writ

Members of Congress are exploiting public concerns about terrorism to threaten basic civil liberties. Of these, not one is more precious than the writ of habeas corpus — the venerable Great Writ devised by English judges to guard against arbitrary imprisonment and, in modern terms, a vital shield against unfair trials.

Both the House and Senate have voted to weaken the modern version of habeas corpus beyond recognition. Invading the province of the independent Federal judiciary, their proposals would forbid judges from rendering their own findings of fact and law, virtually instructing the judges to decide cases against the petitioning prisoner. President Clinton, who has waffled on the issue, needs to warn Congress that he will not sign this unconstitutional measure just to get a terrorism law.

The writ has long been available in America to tell sheriffs and wardens to "produce the body" of the prisoner and justify the jailing in court. Congress applied the habeas corpus power in 1867 to give Federal district courts the power to review state criminal convictions. Since then, judges have set aside many sentences of prisoners who failed to receive fair trials, including some condemned to die because prosecutors concealed evidence of their innocence.

The antiterrorism bills contain provisions that would accelerate the executions of condemned prisoners, at great risk to their fundamental rights. These provisions have survived Congressional debate even though other provisions that might actually have done something about terrorism — banning bullets that pierce police vests and tagging explosives to enable law enforcement to trace terrorist bombs — were scrapped on the House floor.

The most pernicious legal change would instruct Federal judges that they are bound by state court findings when determining the fairness of a prisoner's criminal trial. Only when those findings are "unreasonable" or flatly contradict clearly announced Supreme Court rulings can the Federal court overturn them. State courts rarely disobey the high court openly. But they still make serious mistakes. Federal judges have often found state court judgments woefully sloppy though masked in neutral language the new proposals would insulate from review.

A Supreme Court case from last year makes the point. By a distressingly thin 5-to-4 margin, the Court set aside the death sentence of a man whose murder conviction rested on the word of an informant whose potential motives for falsely accusing him were known to the police but concealed from the defense. The condemned man's conviction survived many layers of state and Federal judicial review before reaching the Supreme Court. Under the proposal in Congress, the defendant, instead of getting a new trial, would get the chair.

By essentially telling independent Federal judges how to decide cases, the bill unconstitutionally infringes on the jurisdiction of a coordinate branch of government and potentially violates the Constitution's stricture that the writ of habeas corpus shall not be suspended except in time of war or dire emergency. It also includes unrealistic deadlines for filing court petitions and undue restraints on legal resources available to prisoners. Unless a Senate-House conference committee can disentangle habeas corpus from terrorism, Mr. Clinton has a duty to warn that he will veto the entire package.

4-8-96 NYT

Habeas Corpus Law Is Constitutional, Both Sides Agree in Supreme Court Arguments

By STEPHEN LABATON

WASHINGTON, June 3 — Lawyers arguing over an important challenge to a new law limiting appeals by death-row inmates and other convicts agreed in principle before the Supreme Court today that the legislation did not violate the Constitution.

That was unusual in itself. But what made the oral arguments more unusual was that the Court was hearing the case at all. It is rare for the Court to begin considering new cases as the term comes to its end, and the arguments were heard over the objections of the four most liberal Justices, who had complained that the conservative members of the Court had decided to move too hastily to consider the new law.

And, even though there was no doubt expressed today about the constitutionality of the new law, there was confusion about how it was meant to work. More specifically, several Justices voiced concern that the law could have the unintended consequence of foisting an expanded role on the Supreme Court to consider more prisoner appeals just as other Federal courts have been told by Congress and the White House to shut their doors to them.

The law, signed by President Clinton on April 24, sharply restricts death-row inmates and other prisoners from obtaining Federal review of

people from being executed.

But on the other hand, prosecutors have asserted that habeas rules have to be tightened because they have led to expensive, protracted appeals in which clearly guilty prisoners are not executed until many years after their convictions.

Today the justices considered the law's impact on an older statute written into the first Judiciary Act of 1789, which gives the Supreme Court jurisdiction to consider habeas appeals directly, bypassing lower courts. The older law, now in Section 2241 of the Federal code, has not been used by the Supreme Court since 1925, and it is not mentioned in any part of the new law.

Many of the questions from the bench explored whether the new law had actually limited the jurisdiction of the Court, an issue of considerable importance because of the long-running debate among constitutional scholars about when and how Congress can restrict the authority of the judiciary to review cases.

A majority of justices appeared by their questions to suggest that the new law does not repeal the old law. But they left unaddressed the question of how the court would handle those prisoners, now shut out of most other courts, who would file habeas petitions directly with the Court.

The case today was filed by lawyers for Ellis Wayne Felker, a Georgia inmate who was set to be executed last month after being convicted in the 1981 rape and murder of Evelyn Joy Ludlam, a 19-year-old college student. In 1993, Mr. Felker filed a habeas petition that was denied by the courts. Five days after the new law was signed, he filed a second petition.

Under the new legislation, a second petition may only be considered by a Federal district judge after a convict receives permission to file such an appeal by a Federal appeals panel. In this case, the panel rejected Mr. Felker's second petition, and the Court, acting with uncharacteristic speed, decided to review the case.

It asked the lawyers to examine three issues: whether the new law is an unconstitutional restriction of the court's jurisdiction, how it applies to Section 2241, and whether it is a suspension of the writ of habeas corpus in violation of Article I, Section 9, of the Constitution.

For years, conservatives on the High Court led by Chief Justice William H. Rehnquist had taken steps to restrict habeas appeals, although the law adopted by Congress and signed by Mr. Clinton went further than

anything the Court had ever done. Still, it was a sign of the justices' impatience with the existing scheme that the court put today's case on an accelerated track, prompting a bitter dissent from the four more liberal justices who suggested that the court's quick review of the case reflected "unseemly haste."

Lawyers for Mr. Felker, the State of Georgia, and the Clinton Administration today asserted that the law did not unconstitutionally suspend the writ. But they differed markedly on how it affected the Supreme Court's authority to review convictions.

Walking away from the position she had staked out in her brief, Susan V. Boleyn, a senior Assistant Attorney General from Georgia, said the legislation had by implication repealed the Supreme Court's original jurisdiction to award habeas writs. But that argument was met with skepticism by a majority of the justices. Ms. Boleyn said the Supreme Court, under the new legislation, had no authority to free a convict or declare a new trial, even after Justice Stephen G. Breyer posed a hypothetical case in which other Federal courts had denied a prisoner's ap-

peal even when it was shown that all of the witnesses had lied.

Henry P. Monaghan, a law professor at Columbia University who argued on behalf of Mr. Felker, maintained that his client had a valid claim arising out of Section 2241 that should not be affected at all by the new law, a claim that was challenged by Justice Rehnquist and Justice Antonin Scalia.

The case marked the final appearance before the court of Drew S. Days III as the Solicitor General. Mr. Days, who is returning to Yale Law School, advised the court to consider upholding both the old and new laws and suggested that the justices should only exercise their original jurisdiction in extraordinary cases. Mr. Days acknowledged in a response to Justice David Souter that the justices had the authority to appoint special masters in those appeals it had decided to consider.

A decision is expected in the next few weeks in the case, *Felker v. Turpin*, No. 95-8836.

A TRADITION OF CARING:
GIVE TO THE FRESH AIR FUND

Basic agreement, but confusion on how a law will work.

their convictions by curtailing the ability of Federal district and appeals courts to consider habeas corpus petitions. The legislation, the Anti-Terrorism and Effective Death Penalty Act of 1996, sets tough new standards for such appeals, making it impossible for most convicts to file more than one habeas petition.

The rules governing the writ of habeas corpus, a Latin phrase directing a warden to "present the body" to a court, are steeped in technical complexity. But at its essence, the fight over the procedure represents a tension between two important values of justice.

On the one hand, those who have opposed limitations on the writ have said habeas corpus is the only way to make sure that defendants, who are often poor, ill-educated, and represented by marginal lawyers in cases that present the highest stakes, can get a fair review of their convictions and sentences. Indeed, there have been a number of instances when the writ was used to prevent innocent

Our most 'extreme' president? You'll never guess

Here's a trivia question you can ask at your next party: Which president authorized the arrest of the chief justice of the United States?

Your companions, remembering Watergate, are sure to guess, "Richard Nixon?" Some, recalling the New Deal's problems with the Supreme Court, may venture, "Franklin Roosevelt?" Others, out of ignorance, may suggest, "Millard Fillmore?"

No, the correct answer is... the Great Emancipator, Abraham Lincoln! At the outset of the Civil War in the spring of 1861, Lincoln had a problem: Lots of Americans, while wanting to remain in the Union, believed in the right of secession and didn't want his war.

Maryland posed this problem in an acute way. Virginia had been driven to secede by the war; if Maryland seceded too, Washington, D.C., would be surrounded by hostile states. Maryland's Legislature re-



Joseph Sobran

solved that the state would remain in the Union, but opposed the use of force to prevent other states from seceding. In other words, Maryland endorsed the right of secession while choosing not to exercise it. This was a severe blow to the legitimacy of Lincoln's war.

Lincoln took strong measures. He suspended the right of habeas corpus and had thousands of suspected "traitors" (those who rejected his interpretation of the Constitution) jailed without formal charges, trials or contact with attorneys. He even arrested dozens of Maryland legis-

lators and the mayor of Baltimore. Such was "government of the people, by the people, for the people."

Just for good measure, Lincoln sent federal troops to Maryland to make sure the state elected the right kind of legislature next time. They did. Yet the myth persists that Lincoln was making war for the Constitution and "self-government."

One man who strongly objected to these high-handed war measures was Chief Justice Roger Taney. Taney held that Lincoln had acted unconstitutionally in several respects. The president, he argued, had no authority to suspend the privilege of the writ of habeas corpus; only Congress could do that, and even Congress couldn't authorize the president to do it.

Yet Lincoln refused to honor Taney's writ for the release of an arrestee named John Merryman. So the president and the chief justice were locked in mutual defi-

ance. But the president had the real power. In an unusual move, Taney appeared in public before a large crowd to dramatize the issue, announcing that he himself might be arrested before nightfall.

Some thought this was paranoia or melodrama on Taney's part. But he may have caught wind of Lincoln's plan to have him arrested. Lincoln had in fact authorized Ward Hill Lamon, marshal for the District of Columbia, to arrest Taney.

The order was never served. Nobody knows why. But it wouldn't have looked good. Taney was 83 years old, very courageous, and ready to fight for principle. And he was venerable: He'd been appointed to the court by Andrew Jackson nearly 30 years earlier. Lincoln quietly backed down, perhaps reflecting that he'd already stretched the laws. Arresting the chief justice would have cast a strange light on his claim to be "preserving the Constitution."

Lincoln's celebrants rarely mention this illuminating episode. But it tells us a great deal about our most revered president that he would even contemplate such a blow at the independence of the judicial branch. And it supports the view of those, North and South, who charged him with acting as a "dictator."

During the 1960s, the John Birch Society campaigned for the impeachment of Chief Justice Earl Warren. This was widely viewed as "extremism," though the Birchers asked only that Warren be removed from office - not jailed. What are we to say of a man who sought the arbitrary arrest of a chief justice? It's a hell of a way to "preserve the Union" and "defend the Constitution." Yet few Americans are aware of it. Maybe the Great Emancipator should be called the Great Extremist.

Joseph Sobran is a syndicated columnist.

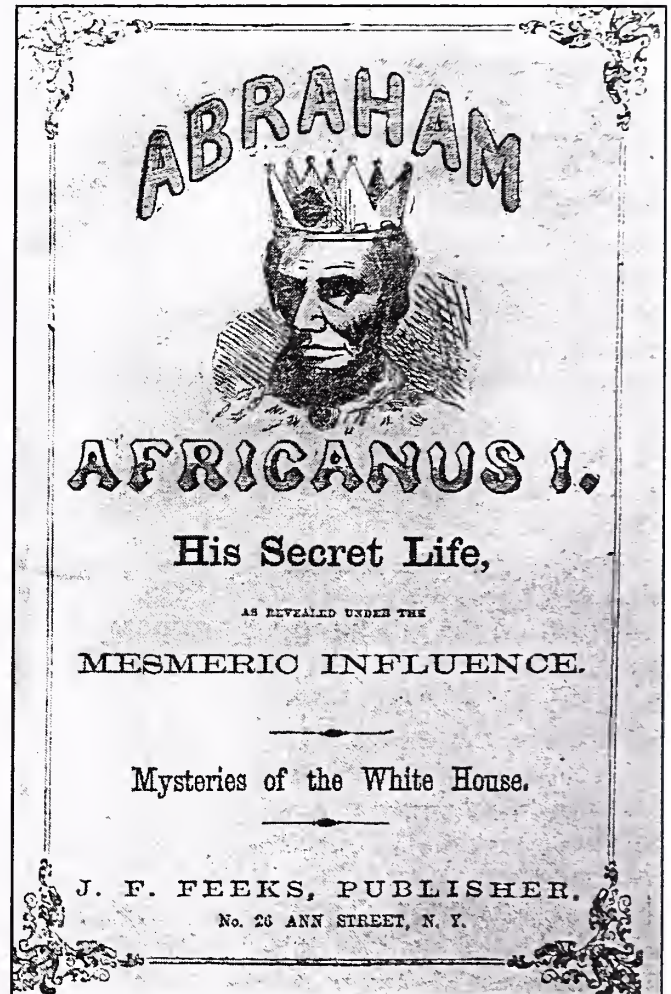
Abraham Lincoln and Civil Liberties: Constitutional Stalwart or Tyrant?

by Dave Byers

"I, Abraham Lincoln, do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States." With these words, Abraham Lincoln became the 16th President of the United States and took upon his shoulders the burden of preserving a rapidly disintegrating Union. The solemn oath he took compelled Lincoln to do everything within his power to preserve both the Constitution and the Union which it embraced. In pursuing this objective, Lincoln enlarged the power of the executive office and in so doing subordinated civil liberties and individual freedoms to the practical necessities of prosecuting the Civil War. This emphasis on the doctrine of necessity makes it impossible to label Lincoln a staunch defender of Constitutional rights. Throughout the war, Lincoln attempted to defend the constitutionality of such a doctrine, but the arguments did not succeed in the context of the legal and historical precedents of the day. Despite the questionable constitutional support for Lincoln's actions, however, he was certainly no abusive tyrant. Lincoln tried to limit any curtailment of individual rights to just what was necessary to handle the situation at hand. Records of communications between Lincoln and his military commanders demonstrate Lincoln's desire for officers to act responsibly and thoughtfully before taking any action which might infringe upon civil liberties. Most inconsistencies and seemingly arbitrary actions can be attributed to the lack of federal organization and the over-reliance on military subordinates to carry out the administration's intents. The greatest threat to individual freedom posed by Lincoln was the establishment of a precedent by which a future president with designs on dictatorship might justify tyranny.

Lincoln's first encounter with civil liberties as President came little more than a month after his inauguration. On April 19, 1861, while passing through Baltimore on its way to Washington, the 6th Massachusetts volunteer infantry was attacked by a mob of secessionist agitators. In the melee, four soldiers and twelve civilians were killed and dozens injured. Rumors flew of pro-Southern factions forming throughout Maryland and the legislature itself was said to be considering secession. Maryland's hostility to the federal army, along with the questionable loyalty of its government, convinced Lincoln that direct and immediate action was necessary to save the state for the Union. On April 27, to keep the military line open and prevent a repeat of the Baltimore riot, Lincoln issued orders to commanding general Winfield Scott authorizing him or local officers under his command to suspend the writ of habeas corpus wherever resistance was met along the Philadelphia to Washington route. In May, Lincoln placed Secretary of State William Seward in charge of "internal security" activities. Seward pursued his duties aggressively, but lacking the proper enforcement and investigative resources in the State department, was compelled to use local marshals, attorneys, postmasters, judges, and citizen informants to gather intelligence on disloyal activities. Arrests were made, the mails were closed to disloyal publications, Southern-addressed mail was intercepted, some newspaper editors were jailed, and a few papers were closed down for a time. Seward's efforts, however, were disorganized, operated with few guidelines, and did not have the capability to separate accusations based on true disloyalty from those based on petty local rivalry. The three clerks in the State department assigned to oversee incoming "disloyal" intelligence were overwhelmed by the volume of information and could only handle a small, almost random, percentage of the incoming cases. These limitations on Seward's internal security measures produced arrests and imprisonments which had the unfortunate appearance of being rather irregular and arbitrary.

The first test for Lincoln's suspension of the writ came on May 25, 1861, with the arrest of Mr. John Merryman, a lieutenant in a Maryland secession company. Merryman was rousted out of bed at



This 1864 anti-Lincoln campaign "biography" portrayed Lincoln as a despot, complete with crown, presiding over a kingdom bent on granting equal rights to African Americans. (Frank and Virginia Williams Collection)

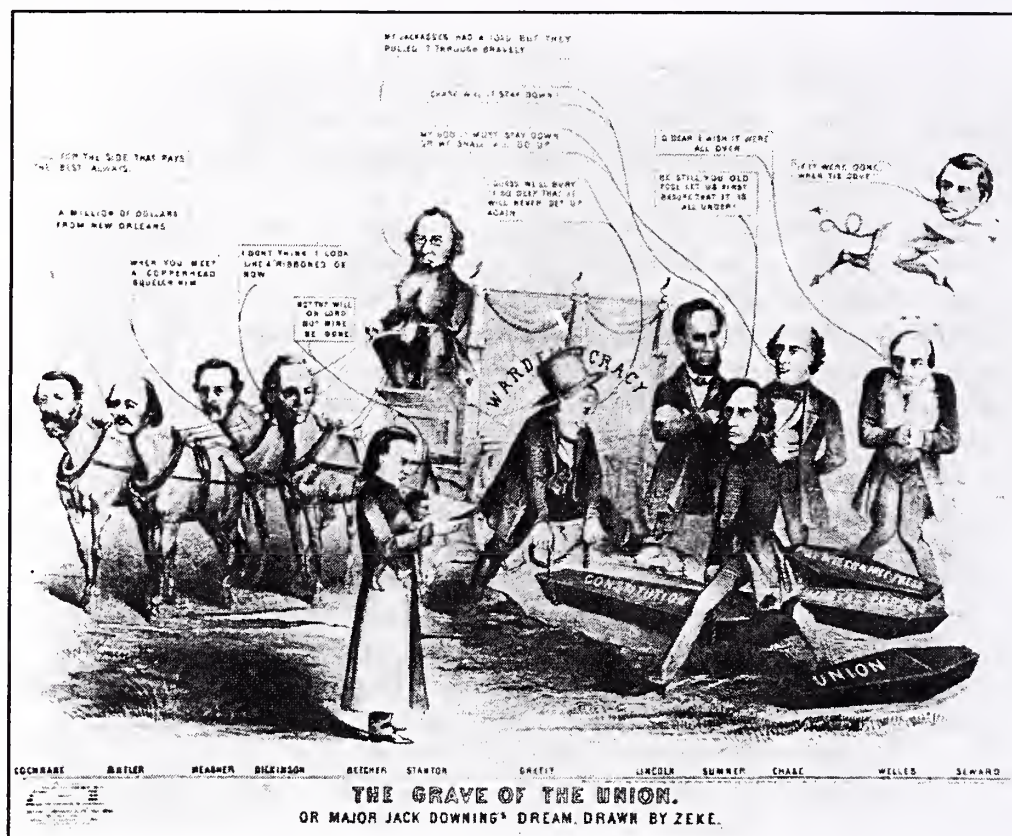
2 AM, moved to Fort McHenry and there confined by post commander General George Cadwalader. Chief Justice Roger Brooke Taney, then seated at the Maryland circuit court, issued a writ of habeas corpus to Cadwalader demanding that Merryman be brought into court to formally be presented with charges. Cadwalader replied that it was clearly established that Merryman was "in avowed hostility to the Government and in readiness to co-operate with those engaged in the present rebellion."¹ He further claimed authorization from the President to suspend the writ in such cases for the public safety, adding that it had been enjoined upon him that "this high and delicate trust....should be executed with judgment and discretion."² Cadwalader appealed to Washington for further instructions. Assistant Adjutant General E.D. Townsend replied, insisting that Cadwalader respectfully decline producing the prisoner and ordering him to "hold in secure confinement all persons implicated in treasonable practices unless you should become satisfied that the arrest was made without sufficient evidence of guilt."³ These communications demonstrate the efforts of the War department to avoid arbitrary arrests and to suspend the writ only in instances where, after careful consideration, evidence clearly indicated the prisoner's guilt. Their efforts may not have always been successful but John Merryman, an armed and dangerous bridge-burning secessionist sympathizer, was just the sort of person the suspension of the writ was designed to neutralize.

Chief Justice Taney, no friend of Lincoln and anti-Republican to his core, was not impressed by any argument supporting the confinement of Merryman. From his chambers he issued the judicial opinion *ex parte Merryman*, in which he censured Lincoln for overstepping the Constitutional bounds of the executive's power.

Article I, section 9 of the Constitution, a section regarding the limitations placed on Congress, specifies in its first clause that "The privilege of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Taney supposed it to be "one of those points of Constitutional law upon which there was no difference of opinion....that the privilege of the writ could not be suspended except by act of Congress."⁴ In support of this contention, he cited numerous historical precedents, ranging from Jefferson's application to Congress for suspension of the writ to deal with the Aaron Burr conspiracy to Chief Justice Marshall's opinion in *ex parte Bollman*. Taney drew parallels with English common law and culled a number of examples from Blackstone's Commentaries, the same source used by the founders in formulating parts of the Constitution. Taney quoted passages from Judge Story's famous

Constitutional Commentaries which spoke of a "peculiar emergency" arising requiring the suspension of the writ, but firmly placed with Congress the authority of determining whether such an emergency had arisen. Taney's argument was clear and persuasive — despite any lack of clarity in the Constitution itself, all legal and historical precedents had firmly given Congress the authority to suspend the writ when and only when, in its judgment, in cases of rebellion or invasion, the public safety may require it.

Taney lightly touched on another point which might be seen as more decisive in determining that Lincoln acted outside of the powers granted by the Constitution. In the initial notice to General Scott, Lincoln had delegated the discretionary power over suspension of the writ to military commanders in the field. Even if Lincoln somehow demonstrated that the Constitution supported the executive suspension of the writ, nothing in that document could have been construed as allowing his delegation of that power. Legal opinion of the day even questioned whether Congress was allowed to delegate the power (as it eventually did, anyway, in the 1863 Habeas Corpus Act). In an exasperated tone as the written word could convey, Taney suggested that "every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found."⁵ There was certainly



The Grave of the Union, an anti-Republican 1864 presidential campaign print, showed a self-satisfied president indifferently observing the burial of such Constitutional guarantees (portrayed here as coffins) as free speech, free press, and habeas corpus. (Library of Congress) Williams Collection.

some truth in Taney's accusation. The disorganized and decentralized effort to identify and neutralize disloyal elements, coupled with power over the writ in the hands of local commanders increased the probability that inconsistent, arbitrary, and potentially revenge-motivated arrests would occur. Despite such pitfalls and Taney's Constitutional argument, the delegation of the suspension power to military subordinates seemed to Lincoln a most efficient and effective way of securing areas of questionable loyalty. Also, the delegation of discretionary power to subordinates in the field rather than the issuance of a blanket suspension of the writ indicates the administration's desire to suspend the writ in as few places as possible and prudent.

Lincoln did not yield to Taney's opinion, nor did he feel the necessity of defending his actions at that time. Officers of the court sent to enforce Taney's order were refused admittance to Fort McHenry, and Merryman languished in jail for two months before Lincoln decided he was a political liability and released him. In a July 4 special message to Congress, Lincoln finally submitted a rationale for his defiance of the venerable jurist. He suggested that, as the whole of the laws were being resisted in one third of the states, and that holding to the law regarding suspension of the writ might tend to encourage that resistance, his oath to preserve and protect the Constitution would on the whole best be served by utilizing executive suspension of the writ. In Lincoln's memorable words, "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"⁶ Lincoln went on to make the point that the Constitution did not clearly specify who had the authority to suspend the writ, and that surely the founders did not intend an executive to stand idly by until Congress could be convened. Lincoln viewed the Constitution as an instrument of action, rather than an instrument of paralysis. The practicality of this rationale can hardly be doubted, but the constitutional argument pales beside Taney's lengthy citation of historical precedent. Clearly demonstrated here is Lincoln's focus on practical necessity rather than strictly legal argument.

In September of 1861, without specific orders from Lincoln, 31 members of the Maryland legislature were seized and imprisoned on the eve of passing an ordinance of secession. The legislators were confined at Fort Lafayette in New York and Fort Warren in Boston Harbor until a loyal government was installed in Maryland. It became a truism in the administration that the suspension of the writ of habeas corpus and the arrests made under that suspension had saved Maryland for the Union.⁷ In the future handling of civil liberties, Lincoln cited the success in Maryland as evidence that the doctrine of necessity was, in fact, a legitimate doctrine, and that in wartime some imposition on individual freedom was acceptable when it secured the preservation of the government.

Through the remaining part of 1861 and most of 1862, arrests and imprisonments continued, along with writ suspensions by local military authorities. The majority of these arrests occurred in the border states, especially Missouri, where genuine conspiracies and violent opposition to the government were being combated on a daily basis. Missouri saw the highest number of arrests of any state during the war and also the first trial by military commission. Bands of guerillas burned crops and barns, destroyed livestock and bridges, and committed various atrocities against the civilian population. Civil disorder and disloyalty were rampant. Missouri was a nightmare for civil liberties, but this was simply a function of Missouri being a nightmare in every other sense, as well. Given the tenuous subordinate command structure, coupled with a disorganized and decentralized effort to control disloyalty, it was inevitable that civil liberties violations would occur in a state rife with partisan warfare. Military justice in Missouri, if sometimes harsh, even brutal, was certainly not arbitrary. Military commissions convened for trial of accused insurrectionists followed prescribed regular procedures, rules of evidence were adhered to, the accused was allowed counsel, and the accused was allowed to face the witnesses against him. Decisions of the commissions could be appealed to the local military commander, and thence on up to the judge advocate general, the general-in-chief, and finally the President. All death penalty sentences were automatically sent to the President for review. In Missouri, at least, trial by military commission was often fairer and more impartial than the local civil court. Missouri and the other border states presented particularly difficult areas to control and military justice was harsh because it needed to be. The majority of border state arrests and military trials dealt with genuine crimes of violence, while comparatively few cases in these areas dealt with less substantial threats such as denouncing the government or expressing secessionist sentiment.

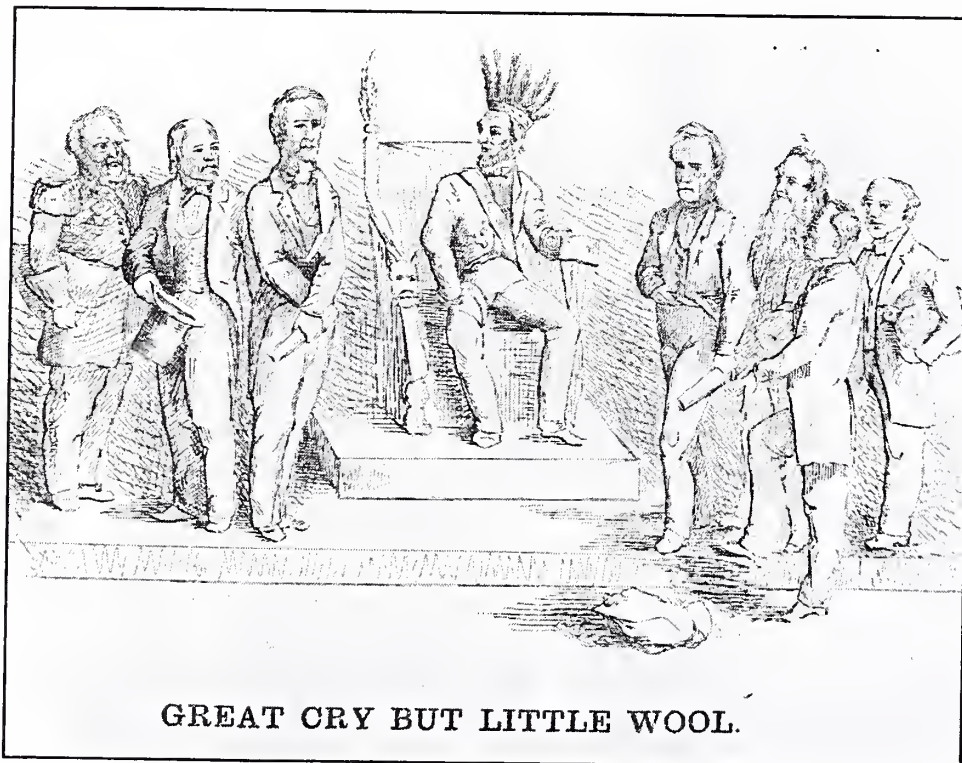
Lincoln continued to enlarge the scope of the writ suspensions a little at a time, only so much as was necessary to meet the exigencies of the moment. On August 8, 1862, Secretary of War Edwin Stanton issued orders, by direction of the President, that the writ was to be suspended across the country for all arrestees who had evaded or interfered with the 1862 Militia Draft or who were detained as a result of disloyal practices. Stanton issued a separate order authorizing all U.S. marshals and chiefs of police of any town or city to arrest those engaged in disloyal acts and detain them for trial by a military commission. These orders had a dramatic impact on the status of civil liberties in the country. Historian Mark Neely called this period the "lowest point for civil liberties in U.S. history to that time."⁸ Where Seward was disorganized, overwhelmed and lacking resources, Stanton was efficient and had the whole war department at his disposal to bring draft evaders and other disloyal persons to justice. However, with practically every small-town official now authorized to work on behalf of the war department, even Stanton could not control the rising tide of arrests and imprisonments which followed his orders. The sweeping series of arrests in late August was driven in many areas by partisan politics, petty rivalries, and revenge. The most celebrated arrest at this time was a federal marshal's seizure of Dennis Mahony, editor of the Dubuque Herald, for publishing articles discouraging enlistments. Mahony would later write of his experiences in *The Prisoner of State*. Published in 1863, it was destined to do much damage to Lincoln's reputation in regards to civil liberties. Stanton's orders were designed to support the draft and combat the widespread problem of evasion, and whatever unfortunate side effects they may have had, they did accomplish their purpose. By September 8, army quotas had been filled and orders were issued relaxing the

stringent military enforcement of the draft and enlistments. Here, that now-familiar doctrine of necessity dictated that concerns over civil liberties were secondary to securing the success of the draft but once that success was obtained, an atmosphere more conducive to individual freedom was restored.

On September 24, 1862, to forestall a repeat of August's confused and disorganized mass arrests in the event of another draft call, Lincoln issued a proclamation which essentially echoed the Stanton orders of August 8. This suspension of the writ across the whole of the North in cases of disloyalty, draft evasion, and enlistment interference, redundant as it was, attracted little attention in the press. In the following May, the press took far greater notice of the arrest of ex-congressman and outspoken Lincoln critic Clement Vallandigham of Ohio.

James Randall, in his *Constitutional Problems under Lincoln*, makes the point that "Lincoln's intention, it must be remembered, was often milder than the temper of the officers who carried out the Union policy."⁹ Such was the case with Vallandigham. In April of 1863, General Ambrose Burnside, commanding the military department of Ohio, issued General Order number 38, which read "treason, expressed or implied, will not be tolerated in this department...The habit of declaring sympathy for the enemy will be punished."¹⁰ Vallandigham, who had been recently gerrymandered out of his congressional seat, was seeking the Democratic nomination for governor and thought that an attack on the Lincoln administration would earn him the publicity and martyrdom necessary to secure the nomination. He spoke to a large crowd at Mt. Vernon, Ohio, warning them against a federal government which had designs on invading every Northern community with military marshals and plundering the civil liberties of the inhabitants. Three days later, Burnside had him arrested and the following day a military commission sentenced Vallandigham to be confined for the remainder of the war. Lincoln privately confided that he regretted the arrest, but publicly saw no choice but to defend Burnside's action and declare his regret only for the necessity of the action. Lincoln changed Vallandigham's sentence to banishment behind Confederate lines, but even this did not prevent Vallandigham from being nominated for governor in June of 1863.

The Vallandigham case sparked a widespread wave of protest from Democrats across the North. New York Congressman Erastus Corning led a delegation which drafted a letter to Lincoln denouncing the Vallandigham arrest and countering Lincoln's doctrine of necessity with the argument that "these safeguards of the rights of the citizen against the pretensions of the arbitrary power were intended more especially for his protection in times of civil commotion."¹¹ Similar letters were sent by other groups, including a lengthy one from an Ohio delegation in which the Ohioans defended the right to free speech, even in opposition to the government, and that this was their right "in time of war as well as in time of peace, and of far more value and necessity in war than in peace, for in peace liberty, security, and property are seldom endangered."¹² Lincoln thought the issue through for about month before issuing his reply, the famous Corning letter.



This obscure lampoon showed Lincoln as an enthroned king, surrounded by aides like William H. Seward (near left) and William T. Sherman (near right). Such cartoons fed the charge that the President was a despot. (The Lincoln Museum)

In the letter, Lincoln accused secessionist sympathizers of plotting all along to use the inevitable suspension of the writ and subsequent arrest of a few innocent persons to discredit the President. He spoke of his reluctance to "adopt the strong measures which by degrees I have been forced to regard as being within the exceptions of the constitution and as indispensable to the public safety."¹³ Lincoln argued that the ordinary courts of justice were not adequate to the task of handling rebellion, and if given complete authority could well be used to aid in that rebellion. The courts, Lincoln said, could only act in a vindictive way to punish those guilty of "defined crimes." During times of rebellion, however, an authority was needed to act in a preventive way to deter crimes against the government which were otherwise undefined by statute. Lincoln believed that the Constitution supported the President's right to this authority.

Lincoln addressed the Vallandigham situation specifically,

stating that Vallandigham was arrested not for “damaging the political prospects of the Administration, ...but because he was damaging the army upon the existence and vigor of which the life of the nation depends.”¹⁴ To further illustrate that Vallandigham’s utterances were more than merely the exercise of free speech, Lincoln asked “Must I shoot a simple-minded soldier boy who deserts while I must not touch a hair of the wily agitator who induces him to desert?”¹⁵ He denied the arrest was a play at party politics by noting that Burnside was a Democrat, and that the judge refusing to release Vallandigham was a Democrat as well. Without shirking the ultimate responsibility for the arrest, Lincoln indicated that he was not certain that he would have made the same decision and resolved to release Vallandigham when it could be proven that he was no longer a threat to the public safety.

In the letter, Lincoln summoned up a folksy, homely metaphor to drive home another important point. Lincoln did not intend for the suspension of the writ, martial law, or trials by military commission to outlast the war. He fully expected that the return to peacetime would bring with it the restoration of the full and true value of individual freedoms granted in the Constitution. He likened the American people to a man who, in time of temporary illness, contracts a strong appetite for emetics. After the illness passed, he expected that the man would not continue feeding on them for the rest of his life, just as he imagined that the country would not develop a permanent taste for the kind of government that was necessary during wartime.

Lincoln’s regret over the arrest of Vallandigham was echoed in several other efforts by the President to restrain subordinates whom he felt had overstepped their orders. Lincoln could accept the suspension of some civil liberties as a necessity of conducting the war effort, but was nevertheless determined to have as small an impact as feasible on individual freedoms. When General Burnside closed down the *Chicago Times*, accusing the editor of making disloyal and incendiary statements in the paper, Lincoln revoked the suspension. After General John Schofield’s arrest of the editor of the *Missouri Democrat*, Lincoln wrote “I regret to learn of the arrest of the Democratic editor. I fear this loses you the middle position I desire you to occupy.”¹⁶ Throughout the course of the war, Lincoln engaged in a careful balancing act between suppressing disloyal and dangerous sentiment and preserving as many individual freedoms as possible.

During the Fall of 1864, Lambdin Milligan, a vocal anti-war, anti-Lincoln activist, publicly declared the war to be “unjust, unnecessary, infamous” and accused Indiana Governor Oliver Morton of being a black-hearted liar and a coward. He was arrested, tried on trumped-up conspiracy charges, and sentenced to hang by a military commission. His appeal resulted in a Supreme Court ruling which would forever taint Lincoln’s reputation on civil liberties. The ruling, handed down in 1866 after the war’s end, declared that if the civil courts were open and functioning, no person could be tried before a military commission. The ruling seemed to condemn Lincoln’s use of military trials to curb disloyalty, but a closer look demonstrates that the ruling is more of a commentary on the differences between peacetime and wartime government. Justice Davis, a friend of Lincoln’s, wrote in the opinion *ex parte* Milligan that “During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial decision.”¹⁷ The decision carefully backed away from passing judgement on the late President, suggesting rather that questions of legality were best not considered during wartime. Legal questions could be resolved once the public safety had been secured, but during time of war passions and tempers combined to inflame sentiment and render purely judicial decisions impossible. In this light, the Milligan decision becomes irrelevant to judging Lincoln’s wartime civil liberties record.

On February 27, 1860, Lincoln closed his famous Cooper Union speech by saying, “Let us have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it.”¹⁸ Lincoln understood his duty as President to be first and foremost the preservation of the Union. Any and all other considerations were secondary to this one central goal. In trying to achieve this goal, Lincoln saw the doctrine of necessity as a legitimate and essential principle to success. Where this doctrine conflicted with the Constitution, Lincoln attempted to reconcile the two, and probably truly believed that he was acting within the bounds of the law, executing his duty as he understood it. Lincoln, however, was clearly acting outside the bounds of the powers of the executive office as it was understood in the legal and historical context of his time.

Even if Lincoln was no constitutional stalwart, he was not a dictatorial tyrant, either. Actions he took in regards to civil liberties were primarily the result of very real threats to the war effort and, thus, the Union. Bridge burners, saboteurs, draft rioters, railroad wreckers, secessionist legislators, smugglers, blockade runners, corrupt businessmen and subversive conspirators all represented substantial perils which could not have been handled by the ordinary course of peacetime law. Lincoln reacted to these threats as carefully and cautiously, yet firmly and decisively as he thought the situation could bear. In instances where he thought the cause of Union necessitated changing the laws, Lincoln viewed the changes as temporary and looked forward to the day, at war’s end, when the rightful laws would be restored. Where the system broke down and civil liberties were violated in excess of what might have been necessary to the war effort, it was largely a result of disorganization, ineffective administration, and incompetent or overzealous subordinate commanders. The administration seemingly staggered from problem to problem, dealing with the particular exigencies of the moment, drafting new orders and proclamations to handle single issues rather than systematically dealing with larger concerns. For this, Lincoln must bear the ultimate responsibility, but he does not deserve the label of tyrant.

Lincoln was determined to save the Union, but he would go only so far. Potential consequences of the election of 1864 carried far more damaging prospects for the Union than any habeas corpus writ. Lincoln, however, would not consider the possibility of suspending the election, as an abusive tyrant might have. At Gettysburg, Lincoln spoke of a “government of the people, by the people, and for the people,” and it was to the people that he appealed for the ultimate justification of his efforts to save the Union. The elec-

tion was a referendum on the war, and Lincoln resolved to live by the results. Far from being a tyrant, Lincoln was willing to risk the Union to preserve an even higher concept, that all power comes from the people.

The greatest danger Lincoln posed to individual freedom lay in the potentially dangerous precedent set by his suspension of some civil liberties. In 1936, historian Andrew McLaughlin said, "That a president armed with war power, may some day wreck the whole constitutional system is theoretically possible, and the dictator, if he ever appears, may discover precedents in the conduct of Lincoln."¹⁹ One can selectively study Lincoln and discover such precedents if that is what one is looking for, but if civil war were ever to come again, any leader would do well to use the whole Lincoln as a guide to the kind of leadership necessary during times of crisis. Despite the questionable legality of some of his actions, Lincoln secured the Union, dared to do his duty as he understood it, and fulfilled his own interpretation of the solemn oath to preserve, protect, and defend the Constitution of the United States.

Notes

1. U.S. War Department, *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* (Washington: Government Printing Office, 1897), Ser. 2, Vol. 1, 576
2. *Ibid.*, 576. 3. *Ibid.*, 577. 4. *Ibid.*, 578. 5. *Ibid.*, 585.
6. Don E. Fehrenbacher, editor, *Abraham Lincoln: Speeches and Writings 1859-1865* (New York: The Library of America, 1989), 253.
7. Mark Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 29.
8. *Ibid.*, 53. 9. *Ibid.*, 228.
10. Phillip Paludan, *The Presidency of Abraham Lincoln* (Lawrence, Kansas: University Press of Kansas, 1994), 199.
11. Fehrenbacher, ed., 455. 12. *Ibid.*, 457.
13. O.R., Ser. 1, Vol. VI, 52.
14. Fehrenbacher, ed., 459. 15. *Ibid.*, 460.
16. Neely, 28.
17. James G. Randall, *Constitutional Problems under Lincoln* (New York: D. Appleton, 1926), 181.
18. Fehrenbacher, 130
19. Neely, 230.

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Lincoln's Example: Executive Power and the Survival of Constitutionalism

Benjamin A. Kleinerman

In the wake of the Bush administration's use of executive power since 9/11, Abraham Lincoln's executive actions during the Civil War have received more attention than usual. Typically associated with the idea that constitutions should recede in favor of the rule of one during crisis situations, Lincoln's actions have been used on one side as the implicit and even explicit basis of presidential claims to increased power and on the other side as the example par excellence of what presidents should not do. Taking issue with this conventional interpretation and continuing the more recent scholarly recovery of Lincoln's profound concern for constitutionalism, I explicate the principles that guided Lincoln's use of executive power during the Civil War. By drawing out the importance of political necessity as the basis for "prerogative" over and against both popular approval and unlimited constitutional powers, I show how this principle also provides an alternative perspective and even an antidote to the current scholarly debate concerning whether constitutions are better preserved by "Jeffersonian" or "Hamiltonian" prerogative. Lincoln's example also shows us that we should not legalize, regularize, or institutionalize those powers that may be necessary to avert a crisis. Perhaps most importantly, Lincoln's statesmanship teaches us that constitutions can moderate and limit discretionary executive power only if the people learn an attachment to their Constitution that does not come naturally to them.

The Bush administration's actions since 9/11 have made scholars and commentators reexamine questions concerning the proper sphere for executive power within a constitutional system of separated powers. Unlike much political research, which disappears into academic journals, newspaper articles abound with conclusions reached by political scientists regarding the need for, and the limits and consequences of, an expanded executive power.¹

The issue has arisen because of the perception by many policy makers that 9/11 has precipitated a crisis requiring extraordinary executive powers that would not otherwise be countenanced in ordinary times. Underlying this perception is the more general question of whether constitutionalism itself can survive in an age of increased insecurity. Locke describes constitutional government as follows: "Whoever has the Legislative or Supream Power of any Commonwealth, is bound to govern by establish'd stand-

ing Laws, promulgated and known to the People, and not by Extemporary decrees."² A constitution seemingly proscribes any governmental action not envisioned and thus legitimized by the laws of the land. But what is to be done when standing laws do not address the actions required to meet present security threats? As good constitutionalists, must we deny ourselves safety for the sake of legal purity? Should we allow the law to impose shackles on the government's power, despite the risk, in order to avoid the alternative risk that an unshackled government poses to our security?³ Or must we agree with Justice Thomas, whose dissenting opinion in *Hamdi v. Rumsfeld* claims that the founders "chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation?"⁴ And, as has been generally true at least since Locke's doctrine of executive prerogative, in Thomas's dissent the extraordinary powers believed necessary to handle "threats" naturally flow into the executive branch.⁵

Thomas's reasoning is sound: the president's "structural advantages," especially the unity of the executive branch, are best suited to protecting our national security. But, as Scalia's dissenting opinion argues, such indefinite and illimitable authority is particularly dangerous in a system of law. While recent Supreme Court opinions are more nuanced, too often the debate does not move beyond the level of simplicity for which Lucius Wilmerding chastised the public fifty years ago in the aftermath of President Harry Truman's seizure of the steel mills:

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Two doctrines . . . equally fallacious and equally dangerous, have been started. One is that the President, as sole possessor of the executive power, has a legal authority, granted him by the Constitution itself, in cases of imperious necessity, to do whatever needs to be done in the public interest. The other is that, under no necessity whatsoever, can an officer, even the President, be excused from departing from the law.⁶

Having moved beyond this level of simplicity, the scholarly debate and, to a lesser extent, the public discourse has been characterized by a second debate, which agrees on the need for executive prerogative, but questions whether or not it is properly considered a constitutional exercise of power. One view, broadly associated with Thomas Jefferson and which finds its most prominent modern proponent in Arthur Schlesinger, understands the prerogative power as outside the Constitution and thus, strictly speaking, as illegal though justifiable by extraordinary necessities. In this view, it is better to maintain an established, almost pristine, Constitution that establishes what can and cannot be done while acknowledging that necessity may force presidents outside its bounds, than to allow the Constitution itself to bend with claims of necessity.⁷ The alternative view, broadly associated with Alexander Hamilton, holds that it is preferable to understand the Constitution as inherently flexible and as possessing within it whatever powers are necessary for its own preservation—an interpretation that typically points to the executive as possessing Lockean prerogative.⁸

Lincoln's Precedent

The American Civil War was the watershed event during which the survival of a constitutional order was most in jeopardy. Could a constitutional government withstand external and internal threats and yet remain *constitutional*? As Lincoln asks with uncommon grace, "Must a government, of necessity, be too strong for the liberties of its own people or too weak to maintain its own existence?"⁹ Not surprisingly, it is during this war that the question of executive prerogative became most salient, both then and to generations of historians and political scientists since. Also, not surprisingly, Lincoln's actions and justifications form a central core of the research on the broad question of executive power in American government.¹⁰

In the aforementioned second debate, there is no clear consensus regarding with which side Lincoln himself would have agreed. Schlesinger cites Lincoln, along with Franklin D. Roosevelt, as examples of defensible prerogative, claiming that "by declining to use claims of inherent presidential power to justify their actions, Lincoln and Roosevelt took care not to give lesser men precedents to be invoked against lesser dangers."¹¹ Sotirios Barber unequivocally cites Lincoln's decisions and justifications as the preeminent example of prerogative as illegal but justified.¹² Robert Scigliano concurs, but claims that Lincoln's actions and, especially, the claims he made to justify them

departed from this standard, introducing a much broader notion of executive prerogative than either Locke or the founders would have defended.¹³ By contrast, George Thomas points to Lincoln's actions to disprove what he calls the "legalist" theory regarding the illegality of executive prerogative, instead placing Lincoln in the Hamiltonian tradition.¹⁴ Similarly, Larry Arnhart defends a version of the Hamiltonian theory of prerogative, but finds Lincoln guilty of setting "an example of violation of the Constitution that could only have a pernicious effect upon his successors."¹⁵

As this brief survey shows, much of the literature on Lincoln's use of executive power analyzes his actions in terms of a larger theory regarding the proper relation between constitutionalism and prerogative. Lincoln's arguments are often treated as illustrative and are not explicated in terms of what they can teach us about this relationship on their own. As we can see by the tremendous disparity in the literature concerning the substance of Lincoln's lesson, Lincoln's "internal" argument demands more explicit attention than it has heretofore received to clarify his own understanding of these matters. More importantly, Lincoln's thoughts on executive prerogative actually provide a corrective to this second debate. This debate's concern about the constitutionality of prerogative has obscured a more publicly useful point concerning the necessarily extraordinary nature of prerogative. As I will explore below, Lincoln points to executive action that is extraordinary and cannot—and *should* not—be regularized, institutionalized, or legalized.

Perhaps the relative inattention to Lincoln's internal argument among scholars of executive power derives from the conventional wisdom regarding Lincoln's example. It had been thought that, if we can learn anything from Lincoln, it is what not to do. Wendell Phillips calls Lincoln an "unlimited despot" and describes his government as a "fearful peril to democratic institutions."¹⁶ Dwight Anderson calls him a "tyrant who would preside over the destruction of the Constitution in order to gratify his own ambition."¹⁷ More sympathetic criticism of Lincoln maintains that he was a man pressed by necessity into becoming a dictator, though a benevolent or a "constitutional dictator."¹⁸ Though friendly to him, these defenses of Lincoln's dictatorship typically point out that there were little to no limits upon his conception of his power during the Civil War.¹⁹ In other words, in the words of one not altogether unsympathetic scholar, Lincoln remains a "revolutionary figure" because he appealed "beyond the Constitution."²⁰ More floridly, William Weeden writes, "To call that man a monarch and despot showed a jurist intoxicated with the musty fumes of legal lore; inebriate with texts and unfitted for the necessary deeds of any desperate time. And the simple, uninstructed, but not ignorant people knew it."²¹ James Ford Rhodes concludes: "never had the power of a dictator fallen into safer and nobler hands."²²

As much as they may redeem Lincoln from his critics, such defenses cannot guide us because we cannot be confident that the present man in the White House (or, for that matter, anyone) has the virtues necessary to put our trust in him as dictator. As Hugh Gallagher writes: "The danger of allowing a President like Lincoln to act without regard to constitutional restraints in a great crisis is that lesser men may take Lincoln as precedent in lesser causes."²³ If these arguments are correct, one must conclude that we should not learn the only thing Lincoln's example appears capable of teaching us: that in grave crises the Constitution should recede in favor of the rule of one.²⁴

This view of Lincoln as establishing the necessity of a "constitutional dictatorship" during a time of crisis finds its way into contemporary discourse. In fact, much of scholars' worry about Lincoln found new life during Richard Nixon's presidential overreaching. In a fascinating (though chilling) interview with David Frost in 1974, Nixon provided fuel for this worry when he justified his authorization of the dubious activities of federal officials in the "Huston Plan" by claiming "when the President does it, that means it is not illegal," citing as precedent Lincoln's activities during the Civil War:

Lincoln said, and I think I can remember the quote almost exactly, he said, "Actions which otherwise would be unconstitutional, could become lawful if undertaken for the purpose of preserving the Constitution and the Nation." Now that's the kind of action I'm referring to. Of course in Lincoln's case it was the survival of the Union in war time, it's the defense of the nation and, who knows, perhaps the survival of the Union.²⁵

Nixon believed that presidential power conferred upon him an illimitable power to take any steps necessary for the defense of the nation. On the other side, Mario Cuomo wishes that President George W. Bush "had not been inspired by Lincoln when it came to the suspension of constitutional rights in the name of security."²⁶ Whether Cuomo is right that Bush actually was inspired by Lincoln is another question; what is important is that a certain view of Lincoln as dictator persists into the present.²⁷

As we see in the example of Nixon, Lincoln's precedent can empower presidents to take actions they might not otherwise take, serving as their implicit or explicit justification for taking any action deemed necessary for the public good. And insofar as those opposing such actions evaluate Lincoln's precedent in the same manner, they must show that Lincoln was wrong. The struggle this imposes on some is clear in Cuomo's chapter on Lincoln and civil liberties. Though finding that Lincoln "promised a return to strict compliance with the Constitution as soon as peace returned" and that "at least he acknowledged that only in the kind of emergency he faced should a president ignore the Constitution as he did," Cuomo still writes, "I wish that the great Lincoln had stood by the Constitution despite the strong temptation not to."²⁸

This opinion regarding Lincoln's dictatorship has begun to change, however. The historian Herman Belz, for example, concludes that "Lincoln was neither a revolutionary nor a dictator, but a constitutionalist who used the executive power to preserve and extend the liberty of the American founding."²⁹ The legal scholar Daniel Farber similarly defends Lincoln's attention to the Constitution, claiming that "many of the acts denounced as dictatorial . . . seem in retrospect to have reasonably good constitutional justifications under the war power."³⁰

By continuing to recover just how much Lincoln remained devoted to the preservation of a *constitutional* Union during the Civil War, we can extract timely political and constitutional lessons. By piecing together his various speeches on this subject, several principles emerge that articulate the constitutional bounds on his use of executive power. These principles constitute an important antidote to the current debate between Jeffersonian and Hamiltonian prerogative, not because Lincoln points to a new alternative legal theory, but because he emphasizes the political necessity, rather than the legal justification, for his actions. By recognizing his principles, we can also perceive Lincoln's attempt to create precisely that political culture that would not allow subsequent executives to misuse his precedent to enlarge their power at the expense of the constitutional order. Finally, Lincoln's principles cast important light on the problematic nature of any legalization of those actions that may be necessary in the "war on terror."

Dangers of Executive Discretion

Edward Corwin once famously called the Constitution an "invitation to struggle." He was speaking about the "privilege of directing American foreign policy," but the point applies more generally.³¹ Our system of separated powers seems to invite each branch to enlarge its power as much as possible over and against the other branches.³² But Lincoln's example teaches some caution in accepting this "invitation to struggle" during national crises. While the executive branch must enlarge its domain to respond to a crisis, such a crisis should not be treated as an opportunity to enlarge permanently the executive domain. Instead, we should expect the executive to proceed with the prudence and caution commensurate with an awareness that such crises could, even unintentionally, destroy the constitutional republic. The founders warn us that executive power, necessarily enlarged during a crisis, can subsume all other aspects of government even after the initial crisis has passed.³³ Insofar as the people perceive a kind of permanent crisis, Hamilton writes, "[T]he continual effort and alarm attendant on a state of danger, will compel nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights."³⁴

While our present national crisis is obviously different, the dangers of exaggerated executive power seems as pressing now as during the Civil War. After all, there is little that creates more "effort and alarm" than the threat of terrorism.³⁵ Yet as it aggregates extraordinary powers, the Bush administration seems insensitive to the danger it poses to the constitutional order. In a recent issue of *Presidential Studies Quarterly* examining the effects of 9/11 on presidential power and constitutional government, one theme united nearly all of the otherwise disparate articles: the Bush administration is seeking strenuously to increase the executive power permanently.³⁶ Given "an invitation to struggle," these attempts to use the crisis to increase executive power permanently make some sense. The executive has merely seized the opportunity that exists in the post-9/11 world. However, because the executive's enlarged discretionary power is "extra-constitutional," it can undermine and, ultimately, destroy constitutional power even after the initial crisis has subsided.

Once discretion is permitted outside the ordinary course of law, the potential for arbitrary and unnecessary prerogative arises. What Locke calls "the power of doing good without a rule" can quickly become the power to do whatever one desires. Locke solves this problem by arguing that the people will be the "umpire," determining whether executive discretion truly aims at their good.³⁷ But this safeguard has troubling implications for constitutionalism if Locke is also correct in claiming that the "People are very seldom, or *never scrupulous*, or nice in the point: they are *far* from examining Prerogative, whilst it is in any *tolerable* degree imploy'd for the use it was meant."³⁸ If constitutionalism requires extra-constitutional discretionary power that is, by its nature, difficult for other branches of the government to check, one would hope that the people are quite scrupulous in determining whether such power aims at their good. Unfortunately, the people are not as scrupulous as they may need to be. In claiming that the people will accept prerogative so long as it is not "manifestly against" their good, Locke emphasized this conclusion. Anecdotally, William Rehnquist makes the same point when discussing the fact that some of Lincoln's subordinates went far in suppressing the freedom of speech of several New York newspapers: "Remarkably, other New York papers did not rally round the sheets that were being suppressed. Instead of crying out about an abridgement of First Amendment rights—as they would surely do today—their rivals simply gloated."³⁹

The dangers of an enlarged executive power attend even if the executive intends to preserve the people's security. The problem is not only that the people will permit an executive to do "good without a rule" in order to protect them; citizens may also find the immediacy and flexibility of executive power more satisfying than the constitutional process itself.

To illustrate this, consider this anecdotal evidence from the Civil War. Mark Neely, in his authoritative book on

Lincoln's record on civil liberties, describes the extent to which many of Lincoln's subordinates began using the enlarged military power that resulted from the suspension of the writ of habeas corpus for purposes that were not strictly military.⁴⁰ For instance, they prosecuted those who were pursuing designs of fraud and corruption—crimes that, while they might have been made possible by the war, had little to do with the goals of the war itself.⁴¹

Associate Judge Advocate Levi C. Turner stated some of the reasons for using martial law in these cases. First, "Claim Agents, who advise and aid in the manufacture of false & fraudulent amounts against the Govt. and present them for payment—and obtain payment—violate no existing Law of Congress." They could only be punished if they "have violated some state Law," which was often not the case. Further, "A military officer makes out a false account for subsistence . . . The officer takes his money (from \$500 to \$10,000) and then resigns." In that case, again "there is no law of Congress or of any State authorizing the arrest & punishment of such plundering." Once these fraudulent and plundering military or civil officers resigned, after having "filled their pockets," they were "beyond the reach of military or civil Laws." They were not, however, beyond the reach of a discretionary executive power. Of desertion, Turner writes, "Persons, all over the country, are engaged in procuring bogus substitutes and aiding and promoting desertions." And while "it is true that a citizen who encourages and aids desertions can be indicted and tried in criminal courts," the process is "so slow and inefficient, that prosecutions for aiding desertions seldom occur, and convictions never."⁴² Again, they were not beyond the reach of the martial law imposed by executive decree.

In these cases, the enlargement of executive power stemmed from motivations other than simple avariciousness. Turner's reasoning had no nefarious intentions. The insufficiency of congressional law and the inefficiency of the criminal courts led to the use of that which was neither insufficient nor inefficient: executive power. For Turner, the use of executive power followed from a desire to see defrauders receive their just deserts and not slip through legal loopholes.⁴³

Precisely because of its great degree of discretion, executive power can promptly and efficiently punish injustice without worrying about legal niceties. Moreover, so long as power is used to effect justice, its solutions are as attractive to the citizenry as they are to those who possess its power; it would be a rare people that could insist on adherence to laws that would allow the unjust to go free. Very few are attached to legal forms as such, no matter the consequences for those protected. In short, the inherent inefficiency and insufficiency in law points toward an extension of that power which possesses the discretion necessary to correct these defects.

In crises, when people's security seems most threatened, they are even more likely to look to executive power to

keep them safe. Its unique institutional structure makes it most capable of the “energy” necessary to provide safety. One can imagine innumerable situations in which such discretionary power is necessary for the preservation of society: Lincoln argued that such was the case during the Civil War. The difficulty arises because, once such power is used, it becomes easier for future executives to assume the same power for lesser causes. But the problem is not just dangerous usurpation. The deeper problem is the people’s attitude toward what might be called “benevolent” usurpation.⁴⁴ The people’s acceptance of extreme remedies during a crisis—acceptance that often is necessary for their safety—sows the seeds for the ultimate destruction of a limiting constitution.⁴⁵ Upon this insight comes the saying, cited by Locke: “[T]he Reigns of good Princes have been always most dangerous to the Liberties of their People.”⁴⁶

Such unreflective popular opinion about prerogative suggests the problematic nature of the Jeffersonian standard by which public acceptance legalizes an otherwise illegal act. If the public is too willing to accept discretionary activity, then such a standard invites usurpation,⁴⁷ or doing the “public good without a rule.”⁴⁸ Thus Jeremy Bailey is partly correct when he defends Jefferson’s standard by claiming that “the dazzle of the president’s prerogative, which exposes execution to popular judgment rather than enshrouding it with legal argument, becomes the very guarantee that the power will be used for the public good.”⁴⁹ As we shall see, Lincoln agreed, at least in part, that prerogative should be proclaimed openly and not shrouded in legal argument. In fact, it is precisely because it should *not* be shrouded in legal arguments that the Jeffersonian *and* the Hamiltonian standards remain too legalistic. The difficulty with Bailey’s argument arises from popular judgment itself.

Lincoln’s Example

Before he was a Republican, Lincoln was a member of the Whig Party, which held that presidents should remain deferential to Congress in matters of both domestic and foreign policy.⁵⁰ Lincoln had consistently subscribed to this principle and articulated its underlying logic with persuasive clarity. For instance, in a speech to the House of Representatives in 1848, Lincoln stated the Whig case against presidential involvement in legislative activities, and argued repeatedly that the U.S.-Mexican War was “unnecessarily and unconstitutionally commenced by the President.”⁵¹ In a subsequent exchange of letters with his friend William Herndon, the two debate the constitutionality of the presidential commencement of war. The question before them was whether “if it shall become necessary, to repel invasion, the President may, without violation of the Constitution, cross the line, and invade territory of another country; and that whether such necessity exists in

any given case, the President is to be the sole judge.” In his response to Herndon (in which one assumes that Herndon has made this argument), Lincoln states the republican logic that demands such power *not* be given to presidents: “Kings had always been involving and impoverishing their peoples in wars, pretending generally, if not always, that the good of the people was the object.” For this reason, the Convention explicitly sought to separate the war-making power from the president so “that no one man should hold the power of bringing this oppression upon us.” And, Lincoln says, the view Herndon has espoused, that the president should be the sole judge of the necessity of preemptive war, “places our President where kings have always stood.”⁵²

For Lincoln in 1848, the Constitution is explicit that a president, at least in regard to war with foreign nations, must be controlled by more than his impression of what constitutes the people’s good. Locke’s federative prerogative is denied to the president of this republic, in order to guard against the oppression of the people by one person.⁵³ The oppressor pretends the people’s good as he involves them in wars; so the American Constitution guards against such pretenses by denying to its president even the possibility of preemptive wars without congressional approval.

Lincoln shows, moreover, that it is the constitutional structure that must contain this sort of prerogative, and not popular judgment. In a speech delivered a month before his letter to Herndon, Lincoln claimed that President James K. Polk escaped scrutiny about the beginning of the Mexican war “by fixing the public gaze upon the exceeding brightness of military glory—that attractive rainbow, that rises in showers of blood—that serpent’s eye, that charms to destroy.”⁵⁴ When Polk “unnecessarily and unconstitutionally” commenced war with Mexico, the public succumbed far too easily to the seductive glory that attends military conquest, forgetting the war’s unnecessary and unconstitutional beginnings. The constitutional structure, however, allows Lincoln to do what the public will not, that is, to use his podium as a member of the House of Representatives to call attention to the unsavory beginning of the war, and use his power to vote for a resolution declaring such to be the case.⁵⁵

Lincoln’s crucial problem with Polk’s action was that he took it for “some strong motive” with no basis in necessity. In fact, he repeatedly called on Polk to explain the need for his action—which Polk was unwilling to do. Lincoln claimed that Polk would not defend his decision to go to war because “he is deeply conscious of being in the wrong” and knew “that he ordered General Taylor into the midst of a peaceful Mexican settlement, purposely to bring on a war.”⁵⁶ Perhaps if Polk could show the necessity of his actions even to his strongest critics (something which, as we will see, Lincoln, as president, is willing to at least attempt), Lincoln’s constitutional complaints

might have been appeased. Or, perhaps what is required, at the minimum, is the attempt itself; if Polk had tried to show the need for his actions, he would have conceded that the attempt was necessary, thus also conceding that the Constitution's structure does not simply recede with the promise of glory. The Constitution imposes that which the people might not: the need for an argument regarding the necessity of "extra-constitutional" action. Lincoln's speeches always pair necessity and constitutionality. If Polk could show that his actions were necessary for the preservation of the Constitution itself, they would have become constitutional; because he could and would not, they were unconstitutional.

This emphasis on necessity, first and foremost, provides the first lesson from Lincoln's words and deeds.⁵⁷ In an 1864 letter to Albert G. Hodges, a newspaper editor, in which Lincoln had been asked "to put in writing the substance of what I verbally said the other day," Lincoln reflects on the actions he took during the course of the war. Lincoln writes, "I felt that measures, *otherwise unconstitutional*, might become *lawful*, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."⁵⁸ For Lincoln, the Constitution only countenances actions taken outside its bounds when those actions can be justified by the strictest understanding of necessity, namely the preservation of the document itself. In this letter, Lincoln's understanding of prerogative is neither Hamiltonian nor Jeffersonian, but some combination of both—which removes the potential for abuse otherwise inherent in both views. He understands his measures as "otherwise unconstitutional," which reminds one of the Jeffersonian standard; however, his measures "become lawful," not through public affirmation, as in Jefferson's standard, but through necessity—the Hamiltonian standard. Because the public is insufficiently vigilant, it is dangerous to claim that an unconstitutional action becomes constitutional if the public accepts it as aiming at the public good. And because there is always the danger that Nixons will become president, the Hamiltonian view is insufficient insofar as it slides into a limitless Constitution.⁵⁹

In Lincoln's formulation, the Constitution remains limiting because it only permits action outside its bounds that aims at its own preservation. Thus, Lincoln's famous metaphor, in the same letter to Hodges, may limit as much as it empowers: "Often a limb must be amputated to save a life; but a life is never wisely given to save a limb."⁶⁰ As much as this may empower an executive to take those steps he believes necessary in crises, it also limits an executive from taking extralegal or illegal steps when no crisis exists. Thus, Lincoln's metaphor may resemble what Justice David Davis wrote in *Ex parte Milligan*: "As necessity creates the rule, so it limits its duration."⁶¹

Because of this singular focus on necessity, Lincoln abandoned the congressional deference with which he began the war.⁶² Lincoln became less deferential to Congress as

he became more convinced that only necessity, not public approval or congressional legislation, could justify action outside the Constitution. At the beginning of the war, Lincoln claimed that actions "whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity." He continued: "[I]t is believed that nothing has been done beyond the constitutional competency of Congress." At this time, Lincoln's notion of prerogative remained close to the Jeffersonian standard. While this position maintains the importance of necessity, Lincoln also justified his actions by citing "popular demand,"⁶³ thus eroding constitutionalism because the people will ask only that the action improves the public good. Perhaps the same could be said of Congress. For instance, Congress's willingness to approve Jefferson's Louisiana Purchase may have legalized his action, but it did not prove that the action was truly necessary and so justifiably unconstitutional.

By the end of the war, Lincoln wrote to General Butler a statement that indicates both that he thought discretionary power must rest firmly on necessity and that this position had become more clear for him over the course of the war: "Nothing justifies the suspending of the civil by the military authority, but military necessity, and of the existence of that necessity the military commander, and not a popular vote, is to decide."⁶⁴ If martial law is needed, the military commander is in a much better position to decide than the public. At first, this position seems to stem from a political calculation on Lincoln's part—his worry being that the public will not vote to create martial law even if it is necessary. However, the public had *already* voted to create martial law,⁶⁵ thus Lincoln's position seems truly to stem from what he writes subsequently: "In your paper of February, you fairly notified me that you contemplated taking a popular vote; and, if fault there be, it was my fault that I did not object then, which I probably should have done, had I studied the subject as closely as I have since done." In fact, Lincoln implies that this standard, rather than popular opinion, will better limit the spread of martial law: "Whatever is not within such necessity should be left undisturbed." Henceforth, he counseled his general to place "whatever you feel is necessary to be done, on this distinct ground of military necessity, *openly* discarding all reliance for what you do, on any election."⁶⁶

For Lincoln, the Constitution itself pointed to the necessity of its preservation through the habeas corpus clause; more than that, it pointed to a distinction between ordinary times and extraordinary times—the second lesson of Lincoln's words and deeds. In an 1863 letter to Erastus Corning, he claimed that "certain proceedings are constitutional when, in cases of rebellion or invasion, the public safety requires them, which would not be constitutional when, in absence of rebellion or invasion, the public safety does not require them." Lincoln understood his extraordinary use of executive power as necessary precisely because

the situation was truly extraordinary. In using it, he did so constitutionally, but *only* because the situation was, in fact, extraordinary: “[T]he constitution is not its application in all respects the same.” It is different “in cases of Rebellion or invasion, involving the public safety” than it is “in times of profound peace and public security.” Lincoln thus broadened the habeas corpus clause, claiming that the Constitution allows whatever strong measures are necessary for its preservation. They are “good medicine for a sick man.”

But these measures may not be “good food for a well one,”⁶⁷ insofar as they are necessary departures from ordinary law, they should not be institutionalized or regularized. The existing law is not the problem and so need not be changed to meet the crisis. Just as a doctor must give a sick man certain medicines that would destroy his healthful life, Lincoln administered “medicines” to a sick and divided nation that would destroy it if permanently institutionalized.

Lincoln believed that maintaining this critical distinction between the ordinary and the extraordinary substantially removed the danger of his actions.⁶⁸ His own worries about the permanent increase of executive power influenced his response to his critics. It is not enough to say that the requirements of a crisis override concern about individual liberty. If, in responding to the crisis, Lincoln destroyed the constitutional basis of the Union, his actions would have been self-defeating. Because his overriding concern was the survival of a *constitutional* Union, any departure from the bounds of the Constitution must also point back to its restoration. Because of this distinction between the ordinary and the extraordinary, Lincoln claimed to be unable

to appreciate the danger, apprehended by [others], that the American people will, by means of military arrests during the rebellion, lose the right of public discussion, the liberty of speech and the press, the law of evidence, trial by jury, and Habeas Corpus, throughout the indefinite peaceful future which I trust lies before them.⁶⁹

In the next clause of this letter, Lincoln repeated but slightly modified the metaphor comparing executive power to a drug. He was as unable to believe that a danger existed for the nation in the future as he was “[un]able to believe that a man could contract so strong an appetite for emetics during temporary illness, as to persist in feeding upon them through the remainder of his healthful life.”⁷⁰

This rephrasing of the medicine metaphor should not, however, quiet our worries as much as Lincoln claimed it should. While medicine good for a sick person may be bad for a healthy one, it is less clear that that truth will cause him to cease feeding upon it. Lincoln must have known of soldiers who began taking morphine while sick and did not stop once healthy. Isn't there always the danger that drugs one takes while sick will become addictive? Couldn't this same danger exist for the nation with regard

to executive power—that the people will become addicted to the expedient justice of which the executive is uniquely capable. Because the executive can achieve the public good in a more immediate and comprehensive manner than the legislature, the people will not be willing to return to the constitutional separation of powers at the conclusion of the war.⁷¹ Lincoln did his best to establish a strict distinction between the ordinary and the extraordinary to prevent such a sickness; but perhaps this last metaphor indicates that dangers still abound once a constitutional government departs from the constitutional form.

Most importantly, the constitutional form prevents the arbitrary use of power by its possessors either for personal gain or out of moral conviction. As discretionary power increases, so too does the possibility that it will be used in an arbitrary manner that does not seek the public good, or by executives who imagine that precisely their concern for the public good necessitates arbitrary and unconstitutional action. So, the people must beware first that, having given up their constitution for the benevolent rule of a trustworthy executive, they find themselves defenseless against one less trustworthy. The second would not be worrisome if one could be sure that “trustworthy” executives would take such action only when it was demanded by true political necessity—saving constitutionalism itself. But they may also find that the “trustworthy” executive had a moral agenda far grander than the limited ends of a constitutional politics.⁷² Because one might go so far as to say what Franklin said of the people: “[T]here is a natural inclination in mankind to Kingly government,”⁷³ and because powerful executives can exploit this tendency to their detriment, the people must learn an attachment to their Constitution that does not come naturally to them.⁷⁴

For instance, Lincoln often appears unconcerned with the moral urgency of slavery because he insisted upon the unconstitutionality of a simple emancipation proclamation by Congress or the president.⁷⁵ Many would have had him abandon the Constitution to fulfill a higher moral demand. In a letter to Orville Browning concerning John C. Fremont's proclamation freeing the slaves,⁷⁶ Lincoln shows an awareness of these people: “[G]oing the whole figure [freeing the slaves by simple proclamation] I have no doubt would be more popular with some thoughtless people, than that which has been done.”⁷⁷ In fact, Mark Neely claims, “One cannot be certain without public opinion polls, but it seems likely that the most unpopular measure taken by President Lincoln in the first year of the war was his revocation of Fremont's emancipation proclamation for Missouri.”⁷⁸ The people are not just willing to accept prerogative, they are naturally attracted to it because of its ability to effect justice immediately and uncompromisingly. So, Lincoln chose to revoke Fremont's proclamation not because such an extension of executive power was not popular but, at least in part, because it was: “You [Browning] speak of it as being the only means of saving

the government. On the contrary it is itself the surrender of the government.”⁷⁹ The people’s willingness to embrace such actions by their executive would spell the end of constitutional government.

To avert this danger, Lincoln drew the brightest line possible between that which the survival of the Constitution mandates and that which his personal moral feelings might desire. After revoking General Fremont’s proclamation freeing the slaves, he explained to Orville Browning that such a proclamation, at that time in the war, was “purely political, and not within the range of military law, or necessity”—and so, “simply dictatorship.” Even though if he were a member of a state legislature, he would have supported emancipation, his position as president during a crisis did not allow him to “expressly or impliedly seize and exercise the permanent legislative functions of the government.” In his 1864 letter to Hodges, Lincoln repeated this distinction between personal moral feelings and constitutional duty: “I am naturally anti-slavery. If slavery is not wrong, nothing is wrong.” But he did not understand the presidency to confer upon him “an unrestricted right to act officially upon this judgment and feeling.”⁸⁰ Earlier, in his 1862 public letter to Horace Greeley, written after Lincoln had decided he would issue the Emancipation Proclamation, he made clear that his “paramount object in this struggle is to save the Union, and not either to save or to destroy slavery.” Again he claimed to have “stated my purpose according to my view of *official duty*” intending “no modification of my oft-expressed *personal* wish that all men every where could be free.”⁸¹ He drew this line because of, not despite, his discretionary actions as executive during the crisis. In drawing this line and thus merely fulfilling his oath of office, to preserve the Constitution, he remains within the broader bounds of a constitutional polity.⁸² Drawing such a line also teaches the people restraint: they learn that they should neither ask nor allow a *constitutional* executive to use his extra-constitutional power to fulfill either his or their moral wishes. Only this education can prevent the descent of the constitutional order into absolutism.

I have uncovered three principles from Lincoln’s action. First, action outside and sometimes against the Constitution is only constitutional when the constitutional union itself is at risk; a concern for the public good is insufficient grounds for the executive to exercise discretionary power. Second, the Constitution should be understood as different during extraordinary times than during ordinary times; thus discretionary action should take place only in extraordinary circumstances and should be understood as extraordinary. Since it is only necessitated by the crisis, the action should have no effect on the existing law. To preserve constitutionalism after the crisis, the actions must not be regularized or institutionalized. Third, a line must separate the executive’s personal feeling and his official duty. He should take only those actions that fulfill his

official duty, the preservation of the Constitution, even, or especially, if the people want him to go further.

Conclusion

Long before he became president, Lincoln delivered a speech before the Young Men’s Lyceum of Springfield, Illinois in 1838. This speech, made much more famous by scholars over the last fifty years than it was then, concludes with a call for a “reverence for the constitution and the laws.”⁸³ Such reverence, which Lincoln argued must be grounded by “reason, cold, calculating, unimpassioned reason,” is needed because of the threat that future men of great ambition—those from the “family of the lion, or the tribe of eagle”—pose to the constitutional regime. These men will, to fulfill their ambitions, attempt to destroy the “beaten path” of constitutionalism, seeking instead “regions hitherto unexplored.” When such a man does arise, “it will require the people to be united with each other, attached to the government and laws, and generally intelligent, to successfully frustrate his designs.”⁸⁴

In the context of Lincoln’s words and actions during the Civil War, it is useful to return to this speech because it reveals much about Lincoln’s underlying worries about the relation between the rule of one and constitutionalism. Prior to the aforementioned passage, Lincoln had discussed what he called the “mobocratic spirit”—a lack of respect for the laws in adjudicating justice and a preference for the immediacy of mob justice. Such a spirit would cause not only the mob but other good men—“men who love tranquility”—to turn away from the Constitution in search of that which would once again make them feel secure.⁸⁵ In such a country, men of the greatest ambition would find the citizenry necessary to fulfill their ambition. Instead, a “Government . . . constituted like ours,” Lincoln wrote, requires the “attachment of the People” for its maintenance. Constitutions require popular attachment, especially to avert the ambitions of those few who would destroy the constitutional order to fulfill their own ambition or even to promote what they think is the public good.

In the Civil War, Lincoln was presented with precisely that situation which, as he showed in this earlier speech, often leads to the destruction of constitutional orders. He also found a people insufficiently attached to their Constitution. In such a situation, Lincoln did more than merely take those actions necessary for the preservation of the Constitution; he also publicly announced his reasons behind the constitutionally questionable actions he took. In fact, it is only because of this that we can discern the three lessons I have drawn. Lincoln attempted to avert the danger, suggested by the medicine metaphor, that the public will become “addicts” of executive power, by trying to teach the public that his questionable actions were acceptable only within the limits imposed by the Constitution’s

preservation.⁸⁶ If he had simply assumed new powers without acknowledging the extraordinary nature of the extension, the public would have been unprepared to retake such power at the conclusion of the crisis.

In a letter to Edwin M. Stanton in 1864, Lincoln wrote, "While we must, by all available means, prevent the overthrow of the government, we should avoid planting and cultivating too many thorns in the bosom of society."⁸⁷ He attempted to do even more than this; he tried to create that constitutional attachment his Lyceum speech had claimed was so necessary to maintain a constitutional order. That is, he tried to forge in the American people an awareness of both the necessity that permits the abrogation of the Constitution and, as importantly, the limits upon such abrogation. With this education in mind, it is perhaps not accidental that two of the boldest strikes at the claims of executive power occurred immediately after the Civil War: the *Milligan* decision and President Andrew Johnson's impeachment, both of which claimed that extraordinary executive power was permitted only by extraordinary situations.⁸⁸ Lincoln had perhaps created a constitutional attachment so strong that it was willing to strike even at claims of executive power associated with Lincoln himself.

Positioned in America with a different threat, we must beware of simply asserting that current presidents must "be like Lincoln." The difference in the nature of the threat matters; there seemed to be a foreseeable conclusion to the Civil War, after which the necessity of Lincoln's discretionary power would disappear. In the case of the "war on terror," a conclusion seems less likely and thus it is more difficult to see how events could limit any claimed extraordinary power.

Nevertheless, we can learn some things from Lincoln's example. First, justifications for using discretionary power should pass the "necessity" test, within which the preservation of the constitutional order itself is at stake. Only political necessity and not popular or congressional approval can legitimate any discretionary action taken by a president. Lincoln shows us that this standard allows the Constitution to be different for different times, but prevents it from becoming wholly indeterminate and unlimited.

Second, Lincoln's example points to the necessity of a people attached to the constitutional form as such. Precisely because we cannot count on current presidents to educate us as Lincoln did, we must use Lincoln's example to insist on the limitations imposed by constitutionalism. While the Constitution must accommodate political necessity, it should not accommodate political expediency. As both Lincoln and Locke show us, however, this attachment may require a political acuity that the people do not possess naturally. Indeed, the people may all too easily acquiesce and even encourage discretion that is not "manifestly against" their good.

However, Lincoln's statesmanship seems to have produced a constitutional people, at least for a while. To the

extent that we are not now, perhaps the example of his statesmanship can begin to produce such a people once again. If the people are sufficiently attached to the limiting powers of the Constitution, then the Constitution can become again a potent tool for controlling presidential overreaching. Presidents will again become compelled to justify their behavior not in terms of the public good, but in terms of their constitutional responsibility—reducing the danger of the people's natural tendency to accept what a well-intentioned leader claims is for their good.

To create such compulsion, however, we must restore the notion of executive prerogative to the public discourse on power. Legislation such as the Patriot Act points toward the legalization of prerogative, but once prerogative is legalized, it is no longer prerogative. In legalizing such power, we give the government both too much and too little. New situations may call for action not envisioned by the legalization, and so too, the legalization may allow governmental action where it has no legitimate claim. As action that responds to unforeseen exigencies, the necessary powers cannot be envisioned and thus cannot be provided for by the law.

The extraordinary nature of prerogative should instead respond to political exigencies in such a way as to preserve the constitutional order. This compels presidents to justify their actions to the people, thus alerting the people to the dangers of executive prerogative. So long as extraordinary actions are taken outside the public's gaze, as some would argue has been the case with the recent round-up of potential terrorists on the basis of strained readings of existing law,⁸⁹ the public cannot become sufficiently aware of either the necessity of prerogative or the limits upon it. Because naturally the people are insufficiently attached to constitutionalism, they may not insist upon such justifications on their own. The question becomes: are we, or can we become, a constitutional people attached enough to the rule of law so as to prevent the overextension of executive power? In other words, are we capable of insisting upon our Constitution even when presidents do not?

Notes

- 1 For examples, see Robin Toner, *New York Times*, November 18, 2001; Tamara Lytle, *Orlando Sentinel*, September 9, 2002, <http://www.orlandosentinel.com/>; Charles Lane, *Hartford Courant*, September 4, 2002, <http://www.ctnow.com/about/custom/thc/>. For examples of the scholarly debate since 9/11, see, Fatovic 2004a; Baker 2003; Fisher 2003; Elsea 2003; Kassop 2003; Lindsay 2003; Baker 2002.
- 2 Locke 1988, 353 (IX, 131); see also *ibid.*, 359 (XI, 137). For these and all subsequent references to Locke's *Second Treatise*, the Roman numerals and numbers in parentheses represent, respectively, the

chapter and section numbers for those using other editions of the text.

- 3 Here I use *Federalist* 23, which makes the opposite argument: "The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed" (Hamilton, Jay, and Madison 1937, 142).
- 4 *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
- 5 As Scigliano (1989) shows, Edward Corwin (1984) first introduced the notion that the Constitution's executive was based upon Locke's notion of executive prerogative; see Pious 1979, 46–84. For an account that notes the fact that neither *The Federalist* nor the Constitution specifies that these powers belong to the executive, which at the same time shows—through an examination of Locke—why they would most naturally belong to this branch, see Tarcov 1990.
- 6 Wilmerding 1952, 321. For a study of Truman's actions and their implications for presidential power, see Marcus 1977.
- 7 See Schlesinger 1989, especially the afterword accompanying the second edition. Also see Barber 1984, 168–96; Scigliano 1981; Scigliano 1989; Monaghan 1993; Robinson 1996. In his dissenting opinion in *Korematsu v. United States*, Justice Robert Jackson also articulates this position. (*Korematsu v. United States*, at 242–48). For the "Jeffersonian" roots of this power, see Schmitt 1989; Bailey 2004; Fatovic 2004a. Of Jefferson's understanding, Fatovic writes: "Although Jefferson believed that an extraordinary act of executive power could be illegal and legitimate, his constitutional theory draws such a close link between legality and legitimacy that each and every exercise of prerogative is necessarily presumed to be criminal until and unless the president convinces the people and their representatives of the merit of his actions" (2004a, 434).
- 8 See Arnhart 1979; Bessette and Tulis 1981; Sorenson 1989; Storing 1995, 377–85; Thomas 2000. As with the Jeffersonian view, there is divergence within this argument. Arnhart, for instance, finds Lincoln's actions unconstitutional because he went beyond a Constitution that is designed to meet emergencies. Scalia's dissenting opinion in *Hamdi v. Rumsfeld* concludes with similar reasoning. For the association of this view with Alexander Hamilton, see Rossiter 1964; Walling 1999, 123–52, especially 152; Fatovic 2004a.
- 9 Lincoln 1953, 4:426.
- 10 See Corwin 1984, 167, 266–67, 495; Arnhart 1979, 125–30; Pious 1979, 55–60; Bessette and Tulis 1981, 21–22; Barber 1984, 187–96; Robinson 1987, 128–29; Schlesinger 1989, 322–23, 458–60; Scigliano 1989, 252–53; Franklin 1991, 46–48; Storing 1995, 382.
- 11 Schlesinger 1989, 460. Schlesinger seems to think that Lincoln would agree with his understanding of the constitutional basis of prerogative, although this is not quite clear from Schlesinger's argument. For some indication that Schlesinger thinks Lincoln held the Hamiltonian view, see pp. 148–50.
- 12 Barber 1984, 185–96. For a criticism, see Franklin 1991, 124–26. Also see Farber 2003, 194.
- 13 In fact, Scigliano (1989) claims that Locke intends a more limited definition of prerogative than appears on the surface, but "disguised this meaning regarding prerogative in order to defend himself" (p. 243). On the surface, Locke (1988) points to an executive who has the power, at its extreme, "to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the law, for the publick good" (*Second Treatise*, XIV, 164). For an incisive treatment of Locke's prerogative, see Mansfield 1989, 181–211. Mansfield would disagree with Scigliano's interpretation; he finds that Locke points to an executive who is necessarily "arbitrary" . . . the very thing his constitution was formed to prevent" (p. 189). See also Pasquino 1998; Fatovic 2004b.
- 14 Thomas 2000; see also Bessette and Tulis 1981, 26.
- 15 Arnhart 1979, 130.
- 16 Quoted in Randall 1963, 1–2.
- 17 Anderson 1982, 193.
- 18 Rossiter, 1948, 238. Rossiter endorses Lincoln's actions and claims constitutional republics must resort to such "constitutional dictatorships" in times of crisis. See also Dunning 1965, 20–21; Stephenson 1920, 120; Milton 1944, 78–80; Roche 1952, 598; Dietze 1968, 38. That Lincoln created a "constitutional dictatorship" to traverse the Civil War has become the textbook view; see Pious 1979, 57. For a critique of the concept of constitutional dictatorships, see Belz 1998, 17–43.
- 19 Randall (1963), one of Lincoln's most friendly historians, writes: "It would not be easy to state what Lincoln conceived to be the limit of his powers" (pp. 513–14). Many who ascribe to this view of Lincoln also ascribe to him the origins of twentieth-century statism; see, for instance, Wilson 1962, 99–130; Dietze 1968, 17–62; Kendall and Carey 1970, 84–95.
- 20 Loss 1990, 90. This seems to be the case even for Rossiter's concept insofar as it reminds one more of the temporary dictatorships used by the Romans, about which Hamilton writes at the beginning of *Federalist* 70. Hamilton implies that this Constitution will be superior to the Romans' because it will

- constitute a strong executive within it (Hamilton, Jay, and Madison 1937, 454–55).
- 21 Weeden 1906, 351.
 - 22 Rhodes 1899, 3:442.
 - 23 Gallagher 1974, 223. It was such worries that caused Locke (1988) to write “That the Reigns of good Princes have been always most dangerous to the Liberties of their People” (p. 378, XIV, 166).
 - 24 Lundberg (1980) thinks the Civil War teaches that, “Either way, whether he approves or disapproves of the President, every citizen lives under a constitutional sword of Damocles. Or, put another way, he is like a rat in a constitutional trap. In no other constitutional system does so much depend upon one man, whether saintly or evil” (p. 271).
 - 25 *New York Times*, May 22, 1977.
 - 26 Cuomo 2004, 76.
 - 27 It is not clear that President Bush has been inspired by Lincoln in his post-September 11th actions. In fact, it is not clear what has guided his extension of power. This is in part because, unlike Lincoln, Bush has spent little time publicly defending an increase in executive power in response to the crisis.
 - 28 *Ibid.*, 84–85.
 - 29 Belz 1998, 43. Rostow (1989) too claims: “It seems contrary to the most elementary notions of legal theory to claim that Lincoln’s conduct of the Civil War . . . was unconstitutional” (p. 745). He, however, does not develop his grounds for this claim. Adler (1988) also defends Lincoln’s actions as constitutional; he also does not, however, develop the precedents that we can learn from Lincoln.
 - 30 Farber 2003, 174–75. My analysis agrees with both Belz and Farber that Lincoln was attentive to the import of the Constitution and to constitutionalism more generally. For an alternative view, see Neely 1991.
 - 31 Corwin 1984, 171.
 - 32 In fact, such struggle seems to be required for our system of separated powers to succeed as the founders envisioned. “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.” (Hamilton, Madison, and Jay 1937, 337). For a discussion of the founders’ conception of the separation of powers, see Tulis 2003, 88–91.
 - 33 See, for instance, Hamilton’s argument in *Federalist* 8 and Madison’s arguments as Helvidius in 1793. *Ibid.*, 41–47; Hamilton and Madison 1976.
 - 34 Hamilton, Madison, and Jay 1937, 42 (*Federalist* 8). The best guide to this problem remains Locke’s *Second Treatise*. While showing the need for executive prerogative, he also shows its dangers to the very constitution it is meant to preserve. Mansfield (1989) writes: “But what exactly is a constitutional executive? It is often thought to be an executive subordinate to the constitution. But could it not also be considered an ambivalent, submissive recognition of the need for a strong executive? What then is the precise relationship between the constitution and this executive power? Locke’s political science shows that the modern constitution and the modern executive are mutually dependent and yet antithetical. Each needs and opposes the other” (p. 181). Also see Dunn 1969, 154.
 - 35 For an account of the effect of fear upon our national security measures, see Rosen 2004. He calls for “enlightened political leadership” that will “have the courage to challenge the public’s emotionalism, rather than encouraging it at every turn” (p. 223).
 - 36 See Kassop 2003; Baker 2003; Elsea 2003; Fisher 2003. Lindsay (2003) is more optimistic about the return of a balance between the three institutions after the crisis subsides. Also see Baker (2002), who writes, “The executive branch has made multiple assertions of unilateral authority to respond to the terrorist threat, including the claim that the other branches lack competence to review its assertions” (p. 775).
 - 37 Locke 1988, 378, 427 (XIV, 166; XIX, 242). Engelman (1982) writes: “Locke recognized the extraordinary danger this [prerogative] power presented to his limited constitutional government. Faced with the evident necessity of such a power—and the danger of executive tyranny which could result from it—he saw no other expedient for its abuse than his famous, ominous, summons of the devil of rebellion: ‘The people,’ Locke says, ‘shall judge’ whether the executive threatens their liberty and hence their preservation” (p. 272). For a discussion of the problem of “popular consultation,” see Kendall 1959, 124–31.
 - 38 Locke 1988, 375 (XIV, 161); italics mine.
 - 39 Rehnquist 1998, 47.
 - 40 The privilege of the writ of habeas corpus is constitutionally guaranteed “unless when in Cases of Rebellion or Invasion the public Safety may require it.” It guarantees to someone detained by the government an appearance in court before a judge to determine whether or not that person is imprisoned lawfully. With its suspension, the government is able to detain people without having to show cause. The writ of habeas corpus is often thought to be the fundamental safeguard against lawless and arbitrary state action.
 - 41 Neely 1991.
 - 42 Quoted in *ibid.*, 93–94.
 - 43 For a discussion of the ways in which post-9/11 laws to prevent terrorism are used to catch other sorts of crime, with the people’s acquiescence, see Rosen 2004, 130–57.

- 44 One observer wrote during the Civil War: "One of the most interesting features of the present state of things is the illimited power exercised by the government. Mr. Lincoln is, in that respect, the equal, if not the superior, of Louis Napoleon. The difference consists only in the fact that the President rests his authority on the unanimous consent of the people of the loyal States, the emperor his on the army." Quoted in Rhodes 1899, 3:442.
- 45 Theodore Roosevelt (1906) wrote: "In great crises it may be necessary to overturn constitutions and disregard statutes, just as it may be necessary to establish a vigilance committee, or take refuge in lynch law; but such a remedy is always dangerous, even when absolutely necessary; and the moment it becomes the habitual remedy, it is a proof that society is going backward" (p. 54).
- 46 Locke 1988, 378 (XIV, 166).
- 47 In fact, Jefferson's presidency itself reveals the problem of his standard. For instance, Levy claims that a study of Jefferson's presidential record reveals a quasi-dictator willing to go to any length to crush his political enemies. That Jefferson's understanding of discretion permitted such activities is suggested by the following: "On great occasions, every good officer must be ready to risk himself in going beyond the strict line of law when the public preservation requires it . . . The Feds, and the little band of Quids, in opposition, will try to make something of the infringement of liberty by the military arrest and deportation of citizens, but if it does not beyond such offenders as Swartwout, Bollman, Burr, Blennerhasset, Tyler, etc., they will be supported by the public approbation." Quoted in Levy 1963, 84–85. For a more favorable view of the effects of Jeffersonian prerogative, see Bailey 2004, 747–52.
- 48 Locke 1988, 378 (XIV, 166).
- 49 Bailey 2004, 749.
- 50 Howe 1979, 87–89. Donald points to a Whig tradition within which an executive could defer to the legislature in matters of legislation while remaining strong in matters of war and security. Donald (2001) writes: "Both in strongly asserting his powers and in weakly deferring to Congress, he [Lincoln] was following the Whig creed in which he was raised" (p. 174). He builds his case upon one speech by John Quincy Adams and the document William Whiting produced during the war. One could produce far greater evidence that the Whigs desired presidential deference in all matters, especially in the Whig reaction to Polk's Mexican-American war.
- 51 Lincoln 1953, 1:515. Binkley (1937) writes: "Surely no one could have guessed that in this harassing critic of the war policy of President Polk there lurked even the possibility of a war President who was to deal with Congress and the Constitution at times in a manner more imperious than any President before or since" (pp. 114–15).
- 52 Lincoln 1953, 1:451. For a discussion of the modern growth of presidential power to encompass Herndon's view, see Fisher 1995.
- 53 Locke 1988, 365–66 (XII, 146–48).
- 54 Lincoln 1953, 1:439.
- 55 *Ibid.*, 1:432.
- 56 *Ibid.*, 1:439.
- 57 Contrary to conventional wisdom according to which Lincoln establishes no precedent of military restraint, Carnahan (1998) concludes: "The reminder that military necessity can limit the destruction of war, beyond serving as a justification for destruction, is the most important legacy of Lieber's development and Lincoln's application of military necessity over 130 years ago" (p. 231). For an investigation into the "nearly-forgotten work of Francis Lieber," an American political scientist who Lincoln asked to encode the laws of war, see Farr 1990.
- 58 Lincoln 1953, 7: 281 (emphasis added). Apparently, this is the quotation Nixon had in mind in the previously cited interview with David Frost.
- 59 Sorenson (1989), a strong proponent of Hamiltonian prerogative, argues that Publius's doctrine "culminates in a government with unlimited powers" (p. 278).
- 60 Lincoln 1953, 7:281.
- 61 *Ex parte* Milligan, at 127. For a similar suggestion that the Milligan decision is not so far from Lincoln's standard. See Storing 1995, 383; Bessette and Tulis 1981, 19–20.
- 62 For a discussion of the modification of Lincoln's attitude toward Congress over the course of the war, see Binkley 1937, 122–30; Nicolay and Hay 1890, 9:121–22. In passing, Corwin (1984) also argues that Lincoln's views of his relation to Congress "underwent a gradual stiffening" (p. 167). Benedict (1991) argues that Lincoln remained a Whig, deferential to Congress on these matters throughout the war.
- 63 Many of those who defend Jeffersonian prerogative make much of this term "popular demand" in this speech. See, for instance, Schlesinger 1989, 458.
- 64 Lincoln 1953, 7:487–88.
- 65 *Ibid.*, 7:488 n. 1: "At a Norfolk election held under Butler's orders, citizens voted to retain martial law."
- 66 *Ibid.*, 7:488; italics mine.
- 67 *Ibid.*, VI: 267.
- 68 Anastaplo (1999) similarly writes: "Lincoln would have had his fellow citizens understand that not all crises are like a civil war and that not all Presidents need be entrusted with extraordinary powers. Fundamental to his approach here is his Fourth of July

- observation that 'when an end is lawful and obligatory, the indispensable means to it, are also lawful, and obligatory'" (p. 196). See, also, Fehrenbacher 1987, 122. By contrast, Dietze (1968) claims Lincoln did create a precedent for the use of extraordinary powers in ordinary times: "The exercise of emergency power could conceivably not remain confined to emergencies like war or civil war. It could possibly be claimed by a President in times that were normal, or, by objective standards, quite normal. In the end, the state of emergency possibly could become the rule rather than the exception. Under the pretense of executing the will of the people, a President could thus emerge as a rather permanent dictator" (pp. 57–58). It seems precisely for this reason that Lincoln realized he should not claim to execute the will of the people.
- 69 Lincoln 1953, 6:267.
- 70 Ibid..
- 71 For instance, Locke (1988) writes: "And therefore he, that will look into the History of England, will find, that Prerogative was always largest in the hands of our wisest and best Princes: because the People observing the whole tendency of their Actions to be the publick good, contested not what was done without Law to that end. . . . The People therefore finding reason to be satisfied with these Princes, whenever they acted without or contrary to the Letter of the Law, acquiesced in what they did, and, without the least complaint, let them enlarge their Prerogative as they pleased, judging rightly, that they did nothing herein to the prejudice of their Laws, since they acted conformable to the Foundation and End of all Laws, the publick good" (pp. 377–78 [XIV, 165]).
- 72 Roosevelt (1906) writes: "There certainly never was a more extraordinary despotism than this; the despotism of a man who sought power, not to gratify himself, or those belonging to him, in any of the methods to which all other tyrants have been prone; but to establish the reign of the Lord, as he saw it" (p. 213). For a discussion of the more limited ends and disputes of the constitutional polity defended in *The Federalist*, see McDowell 1993.
- 73 Franklin 1787.
- 74 Engeman (1982) writes: "A good cause can be made that Publius and Lincoln, aware of the limits of the Constitution, were all the more adamant in maintaining the public's attachment to it" (p. 279). For a discussion of cultivating the people's attachment to their Constitution, see Manzer 2001.
- 75 Consider again Engeman (1982), who explores Lincoln's thought on the limitations upon Congress's power of emancipation.
- 76 In a proclamation issued on August 30, 1861, General Fremont had attempted to free the slaves of all rebels against the Union. See Neely 1991, 34.
- 77 Lincoln 1953, 4:532.
- 78 Neely 1991, 49. More generally, Neely claims that, while conscription shook the North and provoked numerous conflicts, the issue of civil liberties provoked little dissent during the Civil War. On this same point, Rhodes (1899) writes: "That the protests against the arbitrary arrests lacked energy and persistence, that the infringements upon the bill of Rights of the Constitution were not actively resisted, is explicable only by the confidence the people had in Abraham Lincoln" (4:171).
- 79 Lincoln 1953, 4:532.
- 80 Ibid., 7:281.
- 81 Ibid., 5:388–89.
- 82 Again, the understanding of Lincoln as remaining within a constitutional polity during the Civil War contrasts with even some of the older views of Lincoln. Henry Adams (1958) claims the civil war "for the time obliterated the Constitution" (p. 195). Even Lincoln's own Secretary of State wrote: "We elect a king every four years and give him absolute power within certain limits, which after all he can interpret for himself." Quoted in Schlesinger 1994, 159.
- 83 Lincoln 1953, 1:115.
- 84 Ibid., 1:114–15. Some have claimed that Lincoln was, in fact, such a man who sought distinction not by, as he might have, "enslaving freemen," but by "emancipating slaves." See, for instance, Wilson 1962. For the most comprehensive alternative understanding of this speech, see Jaffa 1959.
- 85 Lincoln 1953, 1:11.
- 86 Speaking of Lincoln's broader education of the public, Belz (1998) writes: "Lincoln possesses in himself and inculcated in the people constitutionalist conviction that regarded preservation of republican self-government as the nation's defining and paramount purpose" (p. 94).
- 87 Lincoln 1953, 7: 255.
- 88 Ex parte Milligan is often seen as a significant judicial blow to some of the more extravagant claims about the reach of executive power insofar as it rules that a citizen cannot be tried by a military commission appointed by a military commander in a place where the courts remain open and unobstructed.
- 89 See Elsea 2003 and Luban 2005.

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Exploring the Limits of Presidential Power after 9/11: Lessons from Abraham Lincoln's Use of Executive Power during the Civil War

1/3/2006 11:22:00 AM

To: National Desk, Political Reporter

Contact: Bahram Rajaei of American Political Science Association, 202-483-2512 or brajaee@apsanet.org

WASHINGTON, Jan. 3 /U.S. Newswire/ -- The use of discretionary executive power by presidents grows in times of national crisis. Constitutions can limit that expansion, but only if the extraordinary use of executive power is exercised openly and temporarily. So concludes research by political scientist Benjamin A. Kleinerman (Virginia Military Institute) that draws lessons from the use of executive power by President Abraham Lincoln during the Civil War.

Kleinerman's article is entitled "Lincoln's Example: Executive Power and the Survival of Constitutionalism" and appears in the December issue of Perspectives on Politics, a journal of the American Political Science Association. It is available online at <http://www.apsanet.org/imgtest/PerspectivesDec05Kleinerman.pdf>.

As demonstrated by the current NSA eavesdropping controversy, after 9/11 the Bush administration has robustly employed executive power to meet the threat posed by terrorism. These and other actions have raised questions about the proper sphere for executive power in a constitutional system during a crisis. Kleinerman's research speaks directly to this current debate as Lincoln's actions are cited by both advocates and opponents of expanded executive power. The author draws three lessons from Lincoln:

First, "justifications...should pass the 'necessity test' within which the preservation of the constitutional order itself is at stake." Accordingly, "a concern for the public good is insufficient grounds for the executive to exercise discretionary power." This, Kleinerman notes, is because "only political necessity and not popular or congressional approval can legitimate any discretionary action taken by a president."

Second, "discretionary action should only take place in extraordinary circumstances and should be understood as extraordinary." Lincoln himself articulated clear boundaries on his use of discretionary power and repeatedly emphasized that powers assumed in times of crisis must be given up when the crisis subsides. This is important, the author observes, because as in the case of Nixon "Lincoln's precedent can empower presidents to take actions they might not otherwise take, serving as their...justification for taking any action deemed necessary for the public good." Lincoln also expended significant effort to foster public attachment to the Constitution to compel presidents to justify their behavior in terms of their constitutional responsibility. To do so today would require a restoration of "the notion of executive prerogative to the sphere of public discourse."

Third, "a line must separate the executive's personal feeling and his official duty. He should take only those actions that fulfill his official duty, the preservation of the Constitution, even...if the people want him to go further." Legislation such as the Patriot Act points toward the institutionalization of expanded executive power -- but once such power is entrenched, it is no longer prerogative or discretionary. "Because (Lincoln's) overriding concern was the survival of a constitutional Union," states Kleinerman, "any departure from the bounds of the Constitution must also point back to its restoration."

The question of the proper role of executive power today touches on core questions of constitutional order and American politics, including checks and balances, popular will, executive prerogatives, civil liberties, and national security. The author affirms that "we must beware of simply asserting that current presidents must 'be like Lincoln'" and concludes by asking "are we...a constitutional people attached enough to the rule of law so as to prevent the overextension of executive power? In other words, are we capable of insisting upon our

Constitution even when presidents do not?"

The American Political Science Association (est. 1903) is the leading professional organization for the study of political science and has 15,000 members in 80 countries. For more information about political science research visit the APSA's media website, <http://www.politicalsciencenews.org> .

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Libertarian convention to hear Lincoln doubter

By PETE SHERMAN
STAFF WRITER

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When Abraham Lincoln suspended habeas corpus, shut down opposition newspapers and jailed perceived Southern sympathizers during the Civil War, he pretty much crossed himself off the Libertarian Party's list of favorite presidents.

Of course, there's only about one president on the list anyway.

The contrarian party's particular dislike of Lincoln will be apparent on Saturday, when noted Lincoln skeptic Thomas DiLorenzo addresses the Libertarian Party of Illinois' annual convention in Springfield.

DiLorenzo, author of "The Real Lincoln" and "How Capitalism Saved America" and an economics professor at Loyola College in Maryland, considers Lincoln a tyrant, a dictator and the "ideological cornerstone of the centralized, bureaucratic and imperialistic American state."

Lincoln's suspension of habeas corpus is, he has written, "the biggest assault on personal liberty in all of American history."

Speaking from his office, DiLorenzo blamed Lincoln for the massive loss of life in the war, which he argues was waged essentially to protect Northern business interests.

Slavery was only a ruse for the real cause of the war, which DiLorenzo thinks was the Confederacy's revolt against high tariffs. And DiLorenzo suggests slavery would have died a natural death had the United States followed the approach of "compensated emancipation" taken by many European nations.

When so-called neoconservatives recommend invading North Korea, Syria or Iran, sometimes citing Lincoln as inspiration, DiLorenzo blames Lincoln for giving them bad ideas.

DiLorenzo is a favorite among libertarian-leaning folks, including Jan Stover, executive director of the Libertarian Party of Illinois. Stover has been trying to book DiLorenzo for two years. She said her members admire DiLorenzo's emphasis on small government and protecting civil liberties.

In addition to his position at a mainstream Catholic college and his Lincoln book, published by Random House, DiLorenzo has written for the Wall Street Journal, Washington Post, USA Today and Reader's Digest.

However, historians have pounced on several aspects of DiLorenzo's reading of history and accuse him of picking and choosing historical evidence that support his point of view.

For example, DiLorenzo suggests Lincoln fundamentally changed the meaning of the U.S. Constitution, which, he says, was understood before the Civil War to support the possibility of secession. The Constitution never was meant to back a federal government of dependent states, he says.

"Before the Civil War, the Union was voluntary. It only became a mandatory empire after the Civil War (and Lincoln). I don't even give Lincoln credit for saving 'the union,'" DiLorenzo said in an interview.

But historian Harry Jaffa, who has debated DiLorenzo, says DiLorenzo has radically misunderstood the Founding Fathers as well as Lincoln's own evolving thinking regarding race, slavery and democratic philosophy.

"(DiLorenzo's) two big things are that the war was really about the tariff, not about slavery, and that slavery would have ended on its own," said Tom Schwartz, interim director of the Abraham Lincoln Presidential Library and Museum. "He has an ideology and is kind of interpreting Lincoln and his actions against his ideology."

DiLorenzo concedes his primary strength isn't writing history but economic analysis. Much of his work on Lincoln primarily suggests that economics is a powerful, often corrupting force in politics.

In general, presidents have a hard time impressing libertarians.

When asked which ones she admires, Stover mentioned Thomas Jefferson. DiLorenzo also considers himself a Jeffersonian.

"When you have to go all the way back to the third U.S. president to find one who supported limited government, that says something," Stover said.

But can Abe be all that bad, even for DiLorenzo, who might actually visit the Abraham Lincoln Presidential Museum during his visit?

"He lived a long life before becoming president," DiLorenzo said. "If you want, you can admire him for many things. He was a father and brilliant attorney. He was a real, live master politician. So many others portray him as a saint or godlike figure. That's inappropriate. But he was a most masterful politician."

DiLorenzo, however, quickly qualified his compliment.

"Like Bill Clinton times 1,000," he said.

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